CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 38 **APRIL 7, 2004** **NO. 15**

This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs and Border Protection, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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Bureau of Customs and Border Protection

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 2 2004)

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

SUMMARY: The copyrights, trademarks, and trade names recorded with U.S. Customs and Border Protection during the month of February 2004. The last notice was published in the CUSTOMS BULLETIN on March 3, 2004.

Corrections or updates may be sent to Department of Homeland Security, U.S. Customs and Border Protection, Office of Regulations and Rulings, IPR Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: George Frederick McCray, Esq., Chief, Intellectual Property Rights Branch, (202) 572–8710.

Dated: March 10, 2004.

GEORGE FREDERICK MCCRAY, ESQ.,
Chief,
Intellectual Property Rights Branch.

03/01/2004 U.S. CUSTOMS SERVICE PAGE 1
15:05:19 IPR RECORDATIONS ADDED IN FEBRUARY 2004 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP0400029	20040204	20240204	TEA ROSE DOILY COLLECTION	ESPERANZA JEAN ISADA	N
COP0400030	20040206	20240206	VIKING HAT	BABU C. JOHN	N
COP0400031	20040218	20240218	NETWARE 6 5	NOVELL, INC.	N
COP0400032	20040223	20240223	DORA THE EXPLORER - FALL 2001 STYLE GUIDE	VIACOM INTERNATIONAL INC.	N
COP0400033	20040223	20240223	SPONGEBOB SQUAREPANTS- SEASONAL ART 2003 APPAREL	VIACOM INTERNATIONAL	N
COP0400034	20040223	20240223	SPONGEBOB SQUAREPANTS - FALL/WINTER 2003 APPAREL	VIACOM INTERNATIONAL	N
COP0400035	20040225	20240225	ECHOES II COLLECTION	ECHOES L.L.C.	N
COP0400036	20040225	20240225	TIERRACAST 2000 CATALOG	TIERRACAST, INC.	N
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COP0400039	20040225	20240225	TIERRACAST 1998 CATALOG	TIERRACAST, INC.	N
COP0400040	20040225	20240225	FIRE FRAME FOR SCOOTERS	BOREEM INTERNATIONAL TRADING INC	N
SUBTOTAL RECORDATION TYPE			12		
TMK0400083	20040202	20121105	SPLIT-ENDER	TALAVERA HAIR PRODUCTS, INC.	N
TMK0400084	20040202	20040823	NASCAR (& SPEEDBAR DESIGN)	NATIONAL ASSOCIATION FOR STOCK	N
TMK0400085	20040202	20111030	DESIGN	TIANJIN LISHENG PHARMACEUTICAL	N
TMK0400086	20040203	20131011	LEAF LIKE DESIGN	KAMAN MUSIC CORPORATION	N
TMK0400087	20040203	20131018	MILESTONE & DESIGN (M)	FANTASY, INC.	N
TMK0400088	20040203	20130610	ULTRABREATHE	POWERLUNG, INC.	N
TMK0400089	20040204	20121126	MISCELLANEOUS DESIGN	KINGSWAY TRADING, INC.	N
TMK0400090	20040204	20120122	NANG HUONG CHO DAO	CAO NGUYEN, INC.	N
TMK0400091	20040204	20130812	DESIGN	STULL TECHNOLOGIES, INC.	N
TMK0400092	20040204	20130325	ZOUCH	ROBERT LEE & GEORGE WILLIAMS	N
TMK0400093	20040204	20130714	KOHLER	KOHLER CO.	N
TMK0400094	20040204	20130921	ORIOLE BIRD DESIGN	BALTIMORE ORIOLES LTD PARTNERSHI	N
TMK0400095	20040204	20130907	FLORIDA MARLINS AND DESIGN	FLORIDA MARLINS LIMITED PARTNERS	N
TMK0400096	20040205	20140111	STYLIZED FLAG DESIGN (BLACK AND WHITE)	MICROSOFT CORPORATION	N
TMK0400097	20040205	20140104	FLAG DESIGN (COLOR)	MICROSOFT CORPORATION	N
TMK0400098	20040205	20121224	DESIGN	HOLTKOETTER INTERNATIONAL, INC.	N
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TMK0400103	20040205	20120331	NINTENDO POWER AND DESIGN	NINTENDO OF AMERICA INC.	N
TMK0400104	20040205	20101225	NINTENDO	NINTENDO OF AMERICA INC.	N
TMK0400105	20040205	20130608	KIRBY'S DREAM LAND	NINTENDO OF AMERICA INC.	N
TMK0400106	20040205	20130909	METROID PRIME	NINTENDO OF AMERICA INC.	N
TMK0400107	20040205	20130615	YOSHI	NINTENDO OF AMERICA INC.	N
TMK0400108	20040205	20131016	OCB	DRL ENTERPRISES, INC.	N
TMK0400109	20040205	20130610	CIALIS	LILLY ICOS L.L.C.	N
TMK0400110	20040205	20130121	SHRIMP CARICATURE WITH SUNGLASSES	EMPRESS INTERNATIONAL LTD.	N
TMK0400111	20040206	20110711	GOLF WORLD	ADVANCE MAGAZINE PUBLISHERS INC.	N
TMK0400112	20040206	20140606	GLAMOUR	ADVANCE MAGAZINE PUBLISHERS INC.	N
TMK0400113	20040206	20130121	GRILL ALERT	BROOKSTONE COMPANY, INC.	N
TMK0400114	20040206	20120721	THE COLOR WORKSHOP	MARKWINS INTERNATIONAL CORP.	N
TMK0400115	20040206	20050613	THE COLOR INSTITUTE	MARKWINS INTERNATIONAL CORP.	N
TMK0400116	20040206	20090803	MARKWINS	MARKWINS INTERNATIONAL CORP.	N

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TMK0400117	20040206	20091207	MARKWINS PRESENTS ACT	MARKWINS INTERNATIONAL CORP.	N
TMK0400118	20040206	20131111	GLAMOUR GIRLZ	MARKWINS INTERNATIONAL CORP.	N
TMK0400119	20040206	20040503	LINA GALE	MARKWINS INTERNATIONAL CORP.	N
TMK0400120	20040210	20121006	FX	CANON U.S.A., INC.	N
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TMK0400123	20040211	20070111	BLUE COLOR DIE SPRINGS	THE WALLACE BARNES COMPANY	N
TMK0400124	20040211	20091012	POP BY MARKWINS	MARKWINS INTERNATIONAL CORP.	N
TMK0400125	20040211	20100718	POP (STYLIZED)	MARKWINS INTERNATIONAL CORP.	N
TMK0400126	20040212	20130904	GREEN COLOR DIE SPRINGS	THE WALLACE BARNES COMPANY	N
TMK0400127	20040217	20100116	CONFIGURATION OF A REFRACTOR	REICHERT, INC.	N
TMK0400128	20040217	20100404	WET'N' WILD U.S.A.	MARKWINS BEAUTY PRODUCTS, INC.	N
TMK0400129	20040217	20110630	WET'N WILD	MARKWINS BEAUTY PRODUCTS, INC.	N
TMK0400130	20040217	20090516	TROPEZ (STLIZED)	MARKWINS BEAUTY PRODUCTS, INC.	N
TMK0400131	20040217	20130126	BLACK RADIANCE	MARKWINS BEAUTY PRODUCTS, INC.	N
TMK0400132	20040217	20090314	ARTMATIC U.S.A.	MARKWINS BEAUTY PRODUCTS, INC.	N
TMK0400133	20040217	20050716	MONOPOLY & LOGO DESIGN	HASBRO, INC.	N
TMK0400134	20040217	20090425	MONOPOLY & LOGO DESIGN	HASBRO, INC.	N
TMK0400135	20040217	20130826	DESIGN (FLEXIBLE HEAD TOOTHBRUSH)	SMITHKLINE BEECHAM CORPORATION	N
TMK0400136	20040218	20071129	CONVERSE AND DESIGN	CONVERSE INC.	N
TMK0400137	20040218	20050207	CONVERSE ALL STAR CHUCK TAYLOR & DESIGN	CONVERSE INC.	N
TMK0400138	20040218	20060910	DESIGN	CONVERSE INC.	N
TMK0400139	20040218	20100805	CONVERSE ALL STAR CHUCK TAYLOR & DESIGN	CONVERSE INC.	N
TMK0400140	20040218	20121204	DESIGN	CONVERSE INC.	N
TMK0400141	20040218	20041220	ONE STAR AND DESIGN	CONVERSE INC.	N
TMK0400142	20040218	20090422	CONVERSE	CONVERSE INC.	N
TMK0400143	20040218	20041220	CONVERSE	CONVERSE INC.	N
TMK0400144	20040218	20110313	ALL STAR AND DESIGN	CONVERSE INC.	N
TMK0400145	20040218	20060618	ALL STAR AND DESIGN	CONVERSE INC.	N
TMK0400146	20040218	20110210	ALL STAR AND DESIGN	CONVERSE INC.	N
TMK0400147	20040218	20131012	DESIGN	TOYOTA JIDOSHA KABUSHIKI	N
TMK0400148	20040218	20131021	BBRENTANO	BRENTANO HANDBAGS INC.	N
TMK0400149	20040218	20060402	SCOOP	SCOOP MANAGEMENT, INC.	N
TMK0400150	20040218	20090420	DTS	DIGITAL THEATER SYSTEMS, INC.	N
TMK0400151	20040218	20110724	DTS DIGITAL SURROUND	DIGITAL THEATER SYSTEMS, INC.	N
TMK0400152	20040218	20101128	DTS DIGITAL OUT	DIGITAL THEATER SYSTEMS, INC.	N
TMK0400153	20040218	20050516	CASTLE BREWED WITH THE SAME CARE SINCE 1895 THE TASTE	SABMILLER FINANCE B.V.	N
TMK0400154	20040223	20130819	DORA THE EXPLORER	VIACOM INTERNATIONAL INC.	N
TMK0400155	20040223	20130603	DORA THE EXPLORER	VIACOM INTERNATIONAL INC.	N
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TMK0400157	20040223	20060529	ROLAND	AMERICAN ROLAND FOOD CORP.	N
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TMK0400160	20040223	20080308	ROLAND	AMERICAN ROLAND FOOD CORP.	N
TMK0400161	20040223	20110515	ROLAND	AMERICAN ROLAND FOOD CORP.	N
TMK0400162	20040225	20140203	SMITH & WESSON	SMITH & WESSON CORP.	N
TMK0400163	20040225	20130629	COSAMIN	NUTRAMAX LABORATORIES, INC.	N
TMK0400164	20040225	20130629	COSAMIN	NUTRAMAX LABORATORIES, INC.	N
TMK0400165	20040225	20131216	SOLAR SCENTS	HOUSE OF MOHAN CORPORATION	N

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TMK0400166	20040225	20131102	TOMMY BAHAMA	VIEWPOINT INTERNATIONAL INC.	N
TMK0400167	20040225	20140222	DESERT EAGLE	MAGNUM RESEARCH INC.	N
TMK0400168	20040225	20131111	PISCES	HOUSE OF MOHAN CORPORATION	N
TMK0400169	20040225	20131111	AQUARIUS	HOUSE OF MOHAN CORPORATION	N
TMK0400170	20040225	20131118	TAURUS	HOUSE OF MOHAN CORPORATION	N
TMK0400171	20040225	20120701	U.S. POLO ASSOCIATION EXTREME SPORT	UNITED STATES POLO ASSOCIATION	N
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TMK0400173	20040225	20130708	U.S. POLO ASS'N U.S. PA & DESIGN	UNITED STATES POLO ASSOCIATION	N
TMK0400174	20040225	20130216	USPA	UNITED STATES POLO ASSOCIATION	N
TMK0400175	20040225	20080331	UNITED STATES POLO ASSOCIATION	UNITED STATES POLO ASSOCIATION	N
SUBTOTAL RECORDATION TYPE			93		
TNM0400002	20040210	99999999	DISPALCA	CARIBBEAN IMPORTS, INC.	N
SUBTOTAL RECORDATION TYPE			1		
TOTAL RECORDATIONS ADDED THIS MONTH			106		

Airport and Seaport User Fee Advisory Committee Meeting

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of meeting.

SUMMARY: This document announces an open committee meeting of the Customs and Border Protection Airport and Seaport User Fee Federal Advisory Committee.

DATE: Wednesday, April 14, 2004, at 1 p.m.

ADDRESS: Customs International Briefing Conference Room (B 1.5–10), Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Roberto Williams, Office of Finance, Room 4.5A, 1300 Pennsylvania Avenue, Washington, DC 20229, telephone: (202) 927–1101; email: Roberto.M.Williams@dhs.gov.

SUPPLEMENTARY INFORMATION:

This document announces the twenty-seventh meeting of Customs and Border Protection Airport and Seaport User Fee Advisory Committee. The meeting will be held on Wednesday, April 14, 2004, at 1 p.m. at the Customs International Briefing Conference Room (B 1.5–10), Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, DC 20229.

Purpose of Committee

The purpose of this Committee is the performance of advisory responsibilities pursuant to section 286(k) of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. 1356(k) and the Federal Advisory Committee Act, 5 U.S.C. app. 2. The responsibility of this standing Advisory Committee is to advise on issues related to the performance of Airport and Seaport immigration services. This advice should include, but need not be limited to, the time period which such services should be performed, the proper number and deployment of inspection officers, the level of fees, and the appropriateness of any proposed fee. These responsibilities are related to the assessment of an immigration user fee pursuant to section 286(d) of the INA, as amended, 8 U.S.C. 1356(d). The Advisory Committee focuses its attention on those areas of most concern and benefit to the travel industry, the traveling public, and the Federal Government.

Agenda of Meeting

The agenda of the April 14 meeting is as follows:

Agenda:

1. Introduction of the Committee members.
2. Discussion of administrative issues.
3. Discussion of activities since last meeting.
4. Discussion of specific concerns and questions of Committee members.
5. Discussion of future traffic trends.
6. Discussion of relevant written statements submitted in advance by members of the public.
7. Scheduling of next meeting.

Public Participation

The meeting is open to the public, but advance notice of attendance is required to ensure adequate seating. In order to be included on the list of those cleared for admittance, persons planning to attend must notify, at least 5 days prior to the meeting, Roberto Williams, Office of Finance, Room 4.5A, 1300 Pennsylvania Avenue, Washington, DC 20229, telephone: (202) 927–1101; email: Roberto.M.Williams@dhs.gov. Members of the public may submit written statements at any time before or after the meeting to Mr. Williams for consideration by this Advisory Committee. Only written statements received by the contact person at least 5 days prior to the meeting will be considered for discussion at the meeting.

Dated: March 22, 2004

JO ELLEN COHEN,
Acting Assistant Commissioner,
Office of Finance.

[Published in the Federal Register, March 25, 2004 (69 FR 15356)]

19 CFR PART 177, SUBPART B

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING MULTI-FUNCTION PRINTERS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that the Bureau of Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of certain multi-function printers to be offered to the United States Government under an undesignated government procurement contract. The final determination found

that based upon the facts presented, the country of origin of the Canon iRC3200 multi-function printer is Japan.

DATE: The final determination was issued on March 17, 2004. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within 30 days of March 23, 2004.

FOR FURTHER INFORMATION CONTACT: Edward Caldwell, Special Classification and Marking Branch, Office of Regulations and Rulings (202–572–8836).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on March 17, 2004, pursuant to Subpart B of Part 177, Customs Regulations (19 CFR Part 177, subpart B), CBP issued a final determination concerning the country of origin of certain multi-function printers to be offered to the United States Government under an undesignated government procurement contract. The CBP ruling number is HQ 562936. This final determination was issued at the request of Canon, Inc., under procedures set forth at 19 CFR Part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18).

The final determination concluded that, based upon the facts presented, the assembly in Japan of various Japanese- and Chinese-origin parts to create Canon iRC3200 multi-function printers substantially transformed the Chinese-origin components into a product of Japan.

Section 177.29, Customs Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the Federal Register within 60 days of the date the final determination is issued. Section 177.30, Customs Regulations (19 CFR 177.30), states that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the Federal Register.

Dated: March 17, 2004

SANDRA L. BELL,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

Attachment

HQ 562936
March 17, 2004
MAR–2–05 RR:CR:SM 562936 EAC
CATEGORY: Marking

MR. HARVEY M. APPLEBAUM, ESQ.
MR. DAVID R. GRACE, ESQ.
MR. MARK E. FELDMAN, ESQ.
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004–2401

RE: U.S. Government Procurement; Final Determination; country of origin of multi-function printers; substantial transformation; 19 CFR Part 177

DEAR MESSRS. APPLEBAUM, GRACE, AND FELDMAN:

This is in response to your letter dated December 22, 2003, requesting a final determination under subpart B of Part 177, Customs Regulations (19 CFR 177.21 et seq.). Under these regulations, which implement Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2411 et seq.), U.S. Customs and Border Protection ("CBP") issues country of origin advisory rulings and final determinations on whether an article is or would be a product of a designated foreign country or instrumentality for the purpose of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of the Canon "iRC3200" multi-function printer that is assembled in Japan and which Canon intends to sell to the U.S. Government through its Canon U.S.A. affiliate. We note that Canon is a party-at-interest within the meaning of 19 CFR 177.22(d)(2), and is entitled to request this final determination.

FACTS:

Canon has requested this final determination in order to determine the country of origin of the Canon iRC3200 multi-function printer that is capable of performing printing, copying, scanning, and facsimile functions. The printer is comprised of four main subassemblies that have been identified as the printer unit, reader scanner unit, color infrared ("iR") controller unit, and control panel unit. The printer unit itself consists of four smaller subassemblies identified as the laser scanner unit, printer unit without laser scanner ("PWS"), drum unit, and toner cartridge. You state that the printer unit, assembled in Japan, performs the electrophotographic process which is described as the most essential task undertaken by the printer. You further state that the laser scanner unit is perhaps the most complex component of the printer and that its production requires the application of advanced manufacturing technologies.

It is our understanding that during the aforementioned electrophotographic process, a permanent photocopied image is placed onto a sheet of paper through the steps of exposure, development, transfer, and fixing. In describing the electrophotographic process, you state that during the first and most significant step, exposure, a computer image signal is converted into a laser drive signal which must be calibrated to cast a laser beam precisely onto a photosensitive drum. Following exposure, toner is electrostatically attracted to a latent image located on the surface of the photosensitive drum.

The toner develops the latent image into a visible image that is thereafter permanently affixed to printing paper by a fixing unit which is comprised of a heater, fixing film unit, and roller.

The laser scanner unit performs the exposure function that is, in your opinion, the most important and precise element of the electrophotographic process. The laser scanner unit is manufactured within Japan from parts that are predominantly of Japanese origin. With respect to the origin of the other components that form the printer unit, you state that the toner cartridge (which supplies toner to the printer unit) and drum unit (which performs the development processes) are manufactured within Japan from parts of Japanese origin. The PWS unit, on the other hand, is assembled in China. However, the intermediate transfer belt, which is described as the key component of the PWS unit, is manufactured in Japan. The intermediate transfer belt transforms four color images, which are created by four drum units, into a fully integrated color image that is transferred onto print paper.

The second major subassembly of the printer, the reader scanner unit, functions as the "reader" unit of the printer by storing information onto a hard disk that is controlled by the color iR controller unit. The reader scanner unit is assembled within China. However, components that you describe as the key parts of the unit, such as the Charge Coupled Device ("CCD"), lens unit, and xenon lamp, are manufactured in Japan. In regards to the purpose of each of these components, the xenon lamp radiates light onto a document, the lens unit focuses the light reflected from the document onto the sensor portion of the CCD, and the CCD converts the light signal into an electrical signal.

The third major component of the printer, the color iR controller unit, including the software embedded in the unit, is manufactured within Japan. The color iR controller unit integrates the local area network and executes multiple tasks (such as copying, printing, and scanning) efficiently on the network. You state that the cost incurred by Canon in researching and developing the color iR controller unit is substantial. The color iR controller unit consists of three main subassemblies: the MEDOC, which enables the simultaneous performance of multiple tasks; the GRAVES, which performs image processing functions; and the SURF, which allocates the burden of processing printing data between the computer and the printer.

The fourth major component of the printer is the control panel unit. The control panel unit is assembled in China. However, the color Liquid Crystal Display ("LCD"), which is described as the key component of the control panel unit, is manufactured in Japan. The LCD is part of the printer's "touch panel" that indicates the operational status of the printer.

As stated above, the printer's major subassemblies are assembled within Japan to form a completed Canon iRC3200 printer. A description of the processes undertaken to assemble a printer to completion, as set forth in a facsimile transmitted to our office on January 27, 2004, follows.

A. The Printer Unit

1. Laser Scanner Unit Assembly

   An operator assembles a laser chip terminal onto a laser unit printed circuit board ("PCB") and adjusts the power of the laser beam. Then an operator attaches a collimator lens to the laser unit PCB after which the operator measures the focus of the laser spot and checks the exte-

rior of the laser unit. A series of component parts are then attached to the optical case. Such component parts have been identified as the lens supporting board unit, auto registration motor, anamorphosis lens, motor unit, Beam Detect ("BD") sensor unit, laser unit, reflection mirror, cylindrical lens, long deflective element mirror, and BD mirror. After attaching the components to the optical case, the operator adjusts the focus of the cylindrical lens, position of sub scanning, position of BD mirror, power of laser beam, and jitter. A cover is thereafter attached and the image patterns and laser scanner unit exterior are inspected.

2. Printer Unit Without Laser Scanner ("PWS") Assembly

   Various plates, mounts, rails, guides, stays, shafts, and covers are assembled in order to complete the mechanical frames of the printer unit and constitute the first assembly steps of the PWS. Thereafter, the following components are assembled to the frames: toner cartridge drive assembly, drum drive assembly, developing drive assembly, intermediate transfer belt drive assembly, fixing drive assembly, four laser scanner units, pick-up motor drive unit, paper pick-up unit, duplex driver PCB, color iR controller unit, intermediate transfer belt unit, duplex unit, and fixing feeder unit. After attaching these various items, an operator uses cables to connect the components. The alignment of the rollers, intermediate transfer belt unit, laser beam angle, magnification, and starting point of laser scanning is adjusted. An operator then makes adjustments to the laser power, facsimile power, heaters, fans, and toner cartridge motor. Toner cartridges and drum units are subsequently inserted into the frame. An operator temporarily connects the reader scanner unit to the printer unit to check the image. Components used only for testing purposes, such as the four laser scanner units, color iR controller unit, drum units, and toner cartridges, are then removed from the printer and the PWS is packed for shipment.

3. Drum Unit Assembly

   In order to complete the drum unit, an operator assembles numerous components, such as a photosensitive drum, primary charging roller, developing assembly, and developing cylinder. An operator uniformly coats the drum unit with photosensitive materials during assembly. Thereafter, the mechanical precision of the drum unit is inspected and the unit is packaged.

4. Toner Cartridge

   Items such as toner cartridge units, toner cartridge holders, insert labels, logo labels, color labels, and side pads are assembled to complete the toner cartridge. An operator thereafter inspects the item and packs the toner cartridge.

B. Color iR Controller Unit

In order to assemble the color iR controller unit, an operator first combines the controller main PCB with the controller sub-PCB. Multiple components are then attached to the combined PCBs, including items such as a static random access memory PCB, boot read only memory, synchronous random access memory, fan, dust filter, and hard disk. The various components are subsequently connected with cables. An operator then inserts a

power supply cable into the hard disk and distribution units. The assembled color iR controller unit is thereafter inspected.

C. Reader Scanner Unit

In order to build the reader scanner unit, an operator begins by assembling a number of components such as a CCD, lens unit, xenon lamp, interface PCB, lamp regulator PCB, reader controller PCB, and sensor assembly. After connecting the components with cables, an operator adjusts the mechanical alignment of certain items that form the unit. Examples of such adjustments include modifying the position of the mirror assembly and the tension of belts and wires that move optical components, such as the CCD and mirror assembly. An operator then tests the functionality of the item's communication and paper size detection capabilities, the accuracy of input data, the starting point of scanning, and image signals. Upon successful completion of these tests, the reader scanner unit is packaged for shipment.

D. Control Panel Unit

An operator assembles items such as a control panel key PCB, key tops, and LCD in order to produce a control panel unit. The various items are connected with cables. Thereafter, the operator inspects and packages the unit for shipment.

E. Final Assembly

Using screws, an operator attaches four laser scanner units (yellow, magenta, cyan, and black) as well as a color iR controller unit to the PWS. An operator subsequently initializes the random access memory of the color iR controller unit and calibrates the angle of the laser beam, magnification performance, and the starting point of laser scanning. An operator then tests the laser's power and application communication within the printer unit. Drum units and toner cartridges are attached for testing. Thereafter, the starting point of sub-scanning, the blank spaces of right and left in the test print image, and the roller pressure of the fixing rollers are adjusted. The motors and sensors are tested and paper size data is registered. Next, the reader scanner and document feeder units are attached to the printer unit. Screws are utilized to attach covers to the printer and the exterior of the unit is inspected.

Upon completion of the aforementioned assembly procedures, an operator inspects the functionality of the assembled Canon iRC3200 printer. The level of precision of the assembled unit is further tested by printing test patterns and evaluating the images thereby produced. Upon successful completion of the final inspections, the completed iRC3200 is packaged and prepared for shipment.

ISSUE:

Whether the assembled Canon iRC3200 printers are considered to be products of Japan for purposes of U.S. Government procurement.

LAW AND ANALYSIS:

Under Subpart B of Part 177, 19 CFR 177.21 et seq., which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations on whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy

American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also, 19 CFR 177.22(a).

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. Belcrest Linens v. United States, 573 F. Supp. 1149 (CIT 1983), aff'd, 741 F.2d 1368 (Fed. Cir. 1984). Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. See, C.S.D. 80–111, C.S.D. 85–25, C.S.D. 89–110, C.S.D. 89–118, C.S.D. 90–51, and C.S.D. 90–97. In C.S.D. 85–25, 19 Cust. Bull. 844 (1985), we held that for purposes of the Generalized System of Preferences, the assembly of a large number of fabricated components onto a printed circuit board in a process involving a considerable amount of time and skill results in a substantial transformation. In that case, in excess of 50 discrete fabricated components (such as resistors, capacitors, diodes, integrated circuits, sockets, and connectors) were assembled.

CBP has also previously considered, in a number of cases, whether components imported into a country for assembly into printers and other related items have been substantially transformed as a result of such processing. For example, in Headquarters Ruling Letter ("HRL") 562495 dated November 13, 2002, color ink jet printers were assembled within Singapore from components obtained from Malaysia and a number of other countries. The assembly procedures undertaken in Singapore were described as follows:

1. Circuit board assembly for the input/output unit, left side, assembled to the chassis;
2. Power controller printed circuit board assembly assembled to the chassis;
3. Preheating thermal drum inserted into the chassis;
4. Paper path motor assembled to the chassis;
5. Stepper assembly motor assembly, with gear, assembled to the chassis;
6. Control panel cover assembly (user interface) assembled to the chassis;
7. High voltage power supply assembled to the chassis;
8. Input/output circuit assembly board, right, assembled to the chassis;
9. "Barracuda" print head assembly assembled to the chassis;

10. Purge control module assembled to the chassis;
11. Ink load assembly assembled to the chassis;
12. Electronic subsystem (ESS) controller board assembled to the chassis; and,
13. Front cover assembly assembled to the chassis.

Upon completion of the foregoing procedures, the assembled printers were subjected to high voltage electrical testing, inspected, packaged, and prepared for export to the United States.

After considering the totality of the circumstances in HRL 562495, we held that the various imported components were substantially transformed within Singapore and that the assembled printers were required to be marked as products of that country upon entry into the United States. In support of this determination, we noted that the processing operations that occurred within Singapore were complex and extensive, required the integration of 13 major subassemblies to the chassis, and that the resulting product was a new and distinct article of commerce that possessed a new name, character, and use.

Prior to the case cited above, CBP ruled in HRL 561734 dated March 22, 2001, 66 Fed. Reg. 17222, that Sharp multifunctional machines (printer, copier and fax machines) assembled in Japan were a product of Japan for purposes of government procurement. The machines in that case were comprised of 227 parts (108 parts obtained from Japan, 92 from Thailand, 3 from China, and 24 from "other" countries) and eight subassemblies, each of which was assembled in Japan. It was further noted that the scanner unit (one of the eight subassemblies assembled in Japan) was characterized as "the heart of the machine." See also, HRL 561568 dated March 22, 2001, 66 Fed. Reg. 17222.

In HRL 734050 dated June 17, 1991, on the other hand, we determined that the operations performed in China to assemble printers did not substantially transform the Japanese components utilized in those printers. The printers in that case were assembled within China from five main components identified as the "head", "mechanism", "circuit", "power source", and "outer case." The circuit, power source and outer case units were entirely assembled or molded in Japan. The head and mechanical units were manufactured in Japan but exported to China in an unassembled state. All five units were exported to China where the head and mechanical units were assembled with screws and screwdrivers. Thereafter, the head, mechanism, circuit, and power source units were mounted onto the outer case, also with screws and screwdrivers. It was stated that the value of the Japanese-origin components utilized in the printers far exceeded that of the Chinese-origin components. Based upon the foregoing facts, we held that, even though the printers were assembled to completion in China, the country of origin of the completed printers for marking purposes was Japan. In making this determination, we noted that the vast majority of the printer's parts were of Japanese origin and that the operations performed in China were only simple assembly operations.

As the cases set forth above demonstrate, in order to determine whether a substantial transformation occurs when components of various origins are assembled to form completed printers, CBP considers the totality of the circumstances and makes such decisions on a case-by-case basis. The country of origin of the printer's components, extent of the processing that occurs

within a given country, and whether such processing renders a product with a new name, character, or use are primary considerations in such cases. Additionally, factors such as resources expended on product design and development, extent and nature of post-assembly inspection procedures, and worker skill required during the actual manufacturing process will be considered when analyzing whether a substantial transformation has occurred; however, no one such factor is determinative.

As applied to the facts of this case, we find that the assembled Canon iRC3200 multi-function printer is a product of Japan for purposes of U.S. Government procurement. In making this determination, we note that a substantial portion of the printer's individual components and subassemblies are of Japanese origin. You have described a number of these individual components and subassemblies as the "most complex", "key", and "essential" of the printer. In this regard, we recognize that, in addition to the Japanese subassemblies, certain critical Japanese-origin parts are incorporated into the Chinese subassemblies, namely the reader scanner unit and the control panel unit. Furthermore, we find that the processing that occurs in Japan is complex and meaningful, requires the assembly of a large number of components, and renders a new and distinct article of commerce that possesses a new name, character, and use.

HOLDING:

Based upon the facts of this case, we find that the processing in Japan substantially transforms the components of Chinese origin. Therefore, the country of origin of the Canon iRC3200 printer is Japan for purposes of U.S. Government procurement.

Notice of this final determination will be given in the Federal Register as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that CBP reexamine the matter anew and issue a new final determination. Any party-at-interest may, within 30 days after publication of the Federal Register notice referenced above, seek judicial review of this final determination before the Court of International Trade.

SANDRA L. BELL,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, March 23, 2004 (69 FR 13577)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, March 24, 2004,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

Larry L. Burton for SANDRA L. BELL,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

19 CFR PART 177

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF ROMET LARYNGECTOMY FILTER COVERS, BUCHANAN LARYNGECTOMY PROTECTORS AND STOMAFOAM SQUARES

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security

ACTION: Notice of proposed revocation of a ruling letter and treatment relating to the classification of Romet laryngectomy filter covers, Buchanan laryngectomy protectors, and Stomafoam squares.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling concerning the tariff classification of Romet laryngectomy filter covers, Buchanan laryngectomy protectors, and Stomafoam squares, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed actions.

DATE: Comments must be received on or before May 7, 2004.

ADDRESS: Written comments are to be addressed to Bureau of Customs and Border Protection, Office of Regulation and Rulings,

Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at 799 9th St. N.W. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, General Classification Branch, (202) 572–8784.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of Romet laryngectomy filter covers, Buchanan laryngectomy protectors, and Stomafoam squares. Although in this notice Customs is specifically referring to Headquarters Ruling Letter (HQ) 951654, dated July 2, 1992, set forth as attachment "A" to this document, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. No further rulings have been

found. This notice will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In HQ 951654, we ruled that all three laryngectomy covers were classified in subheading 9021.90.80, HTSUS, the provision for "Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof: Other: Other." We also ruled that the merchandise could be entered duty-free under subheading 9817.00.96, HTSUS, the provision for "Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles: Other," because the merchandise is specially designed for use by physically handicapped persons. We now believe that the items are correctly classified according to their material makeup, but retain duty free status under subheading 9817.00.96, HTSUS.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke HQ 951654, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 966874, set forth as attachment "B" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to

substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: March 19, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 951654
July 2, 1992
CLA–2 CO:R:C:M 951654 NLP
CATEGORY: Classification
TARIFF NO.: 9021.90.80; 9817.00.96

MR. THOMAS M. LENNOX
LUMINAUD, INC.
8688 Tyler Blvd.
Mentor, Ohio 44060

RE: Tracheostoma covers; articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; U.S. Note 4(a) to subchapter XVII, Chapter 98

DEAR MR. LENNOX:

This is in response to your letter dated March 9, 1992, requesting the tariff classification of tracheostoma covers (stoma covers) under the Harmonized Tariff Schedule of the United States (HTSUS). Three types of stoma covers were submitted for our review.

FACTS:

According to your submission, stoma covers are used by people who have had their larynx removed (laryngectomies) to replace the lost function of the nose. Since the larynx has been removed and the trachea turned to open in a stoma in the throat just above the lungs, the nose can no longer serve its purpose of warming and moisturizing inhaled air and in keeping airborne foreign materials out of the lungs. Stoma covers serve these functions and also absorb mucus secretions that may be expelled from the stoma and help ease breathing and avoid crusting and coughing.

The first type of stoma cover is called the Romet Laryngectomy Filter Cover, known as the Romet Cover or Romet Laryngectomee Filter. It is a dickey-type cotton knit cover with velcro fastenings. This stoma cover is suitable for outerwear and it will last indefinitely. It is about 8-1/2 inches by 11 inches and it is made in Italy.

The Buchanan Laryngectomee Protector is a bib-type cover that ties around the neck. It is made of white foam that is enclosed in a soft white cotton mesh covering. It is suitable for wearing at home or under regular clothing. This cover is typically used for a day and then it is washed. After 10 washings it should be discarded. The large one is 8-1/2 inches wide by 7-1/4 inches in length. The small one is 6-1/2 inches wide by 4-1/4 inches in length. This cover is made in Scotland.

The Stomafoam squares are small pieces of white foam held in place by a strip of medical grade, non-irritating, non-sensitizing adhesive. They would be used at home when the wearer is not dressed or under regular clothing or neckwear. They typically are used once and discarded. They are 2 inches by 2-1/2 inches. They are sold in bags of 30 individually wrapped squares. The wearer can choose between a cover that is 3/16 of an inch thick or 1/8 of an inch thick. They are not suitable for washing and reusing. These covers will be made in England.

ISSUE:

What is the tariff classification of the three stoma covers under the HTSUS?

Are the stoma covers classified in subheading 9817.00.96, HTSUS, which provides duty free treatment for articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons?

LAW AND ANALYSIS:

The classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's), taken in order.

GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may be applied, taken in order.

Heading 9021, HTSUS, provides for the following:

Orthopedic appliances, including crutches, surgical belts and trusses; splits and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof.

The stoma covers are worn by people who have had their larynx removed. Since the larynx has been removed, the nose can no longer serve its purpose of warming and moisturizing inhaled air and in keeping airborne foreign materials out of the lungs.

The stoma covers serve these functions and also absorb mucus secretions that may be expelled from the stoma and help ease breathing and avoid crusting and coughing. As such, the stoma covers compensate for the disability of not having a larynx.

Therefore, the covers are appliances which are worn on the body to compensate for a disability and they are classified in subheading 9021.90.80, HTSUS.

Subheading 9817.00.96, HTSUS, provides that articles specially designed or adapted for the use or benefit of the blind or other physi-

cally or mentally handicapped persons are eligible for duty free treatment. U.S. Note 4(a) to subchapter XVII, Chapter 98, HTSUS, states that:

For purposes of subheadings 9817.00.92, 9817.00.94 and 9817.00.96, the term "blind or other physically or mentally handicapped persons" includes any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.

People who have had their larynx removed suffer from a permanent physical impairment which limits their ability to breathe.

Therefore, for the purposes of subheading 9817.00.96, HTSUS, people who have had laryngectomies are considered physically handicapped as that term is defined in U.S. Note 4(a) to Subchapter XVII.

The three stoma covers at issue are used by people who have had laryngectomies to help them compensate for the lose of their larnyx. The submitted covers are made of materials, such as cotton and foam, that will absorb moisture and will remain breathable. The covers are made of various thicknesses depending on the size of the stoma and the differing amounts of secretion.

Moreover, the covers have different types of closures, such as, ties, velcro fastenings and self-applied adhesive tape, which allow the wearer to choose a specific cover depending on various factors like one's neck shape, the tenderness of neck tissues and hand/arm use capability. Thus, it is our position that the stoma covers are specially designed for use by persons who have had laryngectomies and they are entitled to entry free of duty under subheading 9817.00.96, HTSUS.

HOLDING:

The stoma covers are classified in subheading 9021.90.80, HTSUS, which provides for orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof: other, other.

The stoma covers are articles specially designed or adapted for the use or benefit of those with a physical handicap. The stoma covers are classified in subheading 9817.00.96, HTSUS, and are eligible for duty-free treatment upon entry into the United States.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966874
CLA–2 RR:CR:GC 966874AM
CATEGORY: CLASSIFICATION
TARIFF NO.: 3919.90.50, 3926.90.98, 6117.80.9510, 9817.00.96

MR. THOMAS M. LENNOX
LUMINAUD, INC.
8688 Tyler Blvd.
Mentor, OH 44060

Re: Revocation of HQ 951654; Romet laryngectomy filter covers, Buchanan laryngectomy protectors, and Stomafoam squares

DEAR MR. LENNOX:

This is in reference to Headquarters Ruling Letter (HQ) 951654, dated July 2, 1992, regarding the classification of Romet laryngectomy filter covers, Buchanan laryngectomy protectors, and Stomafoam squares, pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed the ruling and find it to be incorrect. This ruling sets forth the correct classifications.

FACTS:

Stoma covers are used by people who have had a laryngectomy, the surgical removal of the larynx. In this procedure, the trachea is rerouted to an opening in the neck called a stoma. Hence, inhaled air bypasses the nasopharynx. Stoma covers serve to replace the lost functions of the nasopharynx, namely to filter, warm and moisturize inhaled air and to absorb secretions expelled from the stoma.

Romet laryngectomy filter covers are dickey-type cotton knit covers with velcro fastenings measuring about 8.5 by 11 inches. In advertisements for this article found on the Internet, the colors and styles of the covers are emphasized with slogans such as "let neckbreathers dress in a relaxed and confident manner" (www.luminaud.com/ images/bibs2.jpg). The Romet filter covers do not actually include a filtering material. One website states "Filters can be worn underneath" (www.eaglemedicalsupply.com/ ProductDetails). The cover can be washed and used indefinitely.

The Buchanan laryngectomy protector is made of white foam enclosed in a cotton mesh covering that ties around the neck. It can be worn under clothing or at home. It is typically worn for one day and then washed. After 10 washings it should be discarded. It comes in two sizes, 8.5 x 7.25 inches and 6.5x 4.25 inches.

Stomafoam squares are 2 x 2.5 inch pieces of foam either 1/8 or 3/16 inches thick. They are held in place over the stoma by a strip of adhesive. They are used at home or under regular clothing or neckwear and discarded after each use. They are sold in bags of 30 individually wrapped squares.

In HQ 951654, we ruled that all three laryngectomy covers were classified in subheading 9021.90.80, HTSUS, the provision for "Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture ap-

pliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof: Other: Other." We also ruled that the merchandise could be entered duty-free under subheading 9817.00.96, HTSUS, the provision for "Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles: Other," because the merchandise is specially designed for use by physically handicapped persons.

ISSUE:

Whether the three laryngectomy covers are classified as appliances worn on the body to compensate for a defect of disability, as filters, or as to their material make-up.

LAW AND ANALYSIS:

Merchandise imported into the U.S. is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context that requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs.

In interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The HTSUS provisions under consideration are:

3919	Self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of plastics, whether or not in rolls:
3919.90	Other:
3919.90.50	Other

* * * * * * * * * * * * *

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.90	Other:
3926.90.98	Other

* * * * * * * * * * * * *

6117	Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories:
6117.80	Other accessories:
	Other:
6117.80.95	Other:
6117.80.9510	Of cotton (359)

* * * * * * * * * * * * *

8421	Centrifuges, including centrifugal dryers; filtering or purifying machinery and apparatus, for liquids or gases; parts thereof:
	Filtering or purifying machinery and apparatus for gases:
8421.39	Other:
8421.39.80	Other

* * * * * * * * * * * * *

9021	Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof:
9021.90	Other:
9021.90.80	Other

We have already recognized that the instant merchandise is classified in subheading 9817.00.96, HTSUS, which provides for duty-free treatment for articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons and parts and accessories of such articles. However, the heading text of 9817 and 9021, HTSUS, is not synonymous. Although the "defect or disability" language of heading 9021, HTSUS, is very close to the terms "physically . . . handicapped" in heading 9817, HTSUS, (and we need not attempt to ascertain any differences here), the "articles specially designed or adapted" language of heading 9817 could refer to a much larger set of goods than the "high precision" "appliances" of heading 9021.

In describing the general content and arrangement of Chapter 90, the EN states in pertinent part that: "[T]his Chapter covers a wide variety of instruments and apparatus which are, as a rule, characterised by their high finish and high precision." The EN also lists the following exceptions to the general rule that the instruments and apparatus of this Chapter are high precision types: "ordinary goggles (heading 90.04), simple magnifying glasses and non-magnifying periscopes (heading 90.13), divided scales and school rules (heading 90.17) and fancy hygrometers, irrespective of their accuracy (heading 90.25)." Stoma supplies in general are not listed as one of the exceptions to the high precision rule. Stoma supplies are either disposable plastic ar-

ticles packaged in boxes of 30, worn for a day, washed a few times, and discarded, or textile articles, chosen for their color and style, and worn and washed indefinitely as with other neckware. Therefore, we do not believe they are characterized by high finish and high precision.

Furthermore, the ENs to heading 9021, HTSUS, state, in pertinent part, the following:

(IV) HEARING AIDS

These are generally electrical appliances with a circuit containing one or more microphones (with or without amplifier), a receiver and a battery. The receiver may be worn internally or behind the ear, or it may be designed to be held in the hand against the ear.

This group is **restricted** to appliances for overcoming deafness; it therefore excludes articles such as headphones, amplifiers and the like used in conference rooms or by telephonists to improve the audibility of speech.

(V) OTHER APPLIANCES WHICH ARE WORN OR CARRIED, OR IMPLANTED IN THE BODY, TO COMPENSATE FOR A DEFECT OR DISABILITY

This group includes:

(1) Speech-aids for persons having lost the use of their vocal cords as a result of an injury or a surgical operation. These consist essentially of an electronic impulse generator. When pressed against the neck, for example, they generate vibrations in the cavities of the throat which are modulated by the user to produce audible speech.

(2) Pacemakers for stimulating defective heart muscles. These are roughly the size and weight of a pocket watch and are implanted beneath the skin of the patient's chest. They incorporate an electric battery and are connected by electrodes to the heart, which they provide with the impulses necessary for its functioning. Other types of pacemakers are used to stimulate other organs (for example, the lungs, the rectum or the bladder).

(3) Electronic aids for the blind. These consist essentially of an ultrasonic transmitter-receiver powered by an electric battery. The frequency variations resulting from the time taken for the ultrasonic beam to travel out to an obstacle and be reflected back enable the user, through an appropriate device (e.g., an internal ear-piece), to detect the obstacle and judge its distance.

(4) Appliances implanted in the body, used to support or replace the chemical function of certain organs (e.g., secretion of insulin).

The stoma filters and filter covers are nothing like either the hearing aids of the heading text or the listed examples in the ENs. First, all of the appliances listed are precision electronic devices that actively compensate for the defect or disability. Second, all of the examples assist or replace the function of a failed organ: they amplify sound when the ears have failed, they stimulate the vocal cords or the heart muscle when the larynx or heart has failed, or they pump insulin when the pancreas has stopped working. The instant goods do not actually do anything to assist or replace the function of an organ after its failure. The trachea still functions as a pathway for inhaled and

exhaled air, albeit bypassing the usual route through the nasopharynx. Foam stoma covers simply help filter and humidify the inhaled air and textile stoma covers keep the stoma discreet. Moreover, speech aids for people who have undergone a laryngectomy are specifically mentioned, whereas other accessories for the surgically created stoma are conspicuously absent.

The literature for both the Buchanan laryngectomy protectors and Stomafoam squares uses the word filter to describe their purpose. Heading 8421, HTSUS, provides for filters for gases. EN 84.21 states, in pertinent part, the following:

> **(B) Filtering or purifying machinery, etc., for gases.**
>
> These gas filters and purifiers are used to separate solid or liquid particles from gases, either to recover products of value (e.g., coal dust, metallic particles, etc., recovered from furnace flue gases), or to eliminate harmful materials (e.g., dust extraction, removal of tar, etc., from gases or smoke fumes, removal of oil from steam engine vapours).
>
> They include:
>
> (1) **Filters and purifiers acting solely by mechanical or physical means;** these are of two types. In the first type, as in liquid filters, the separating element consists of a porous surface or mass (felt, cloth, metallic sponge, glass wool, etc.). In the second type, separation is achieved by suddenly reducing the speed of the particles drawn along with the gas, so that they can then be collected by gravity, trapped on an oiled surface, etc. Filters of these types often incorporate fans or water sprays.
>
> * * * * * * * *
>
> Filters of the second type include:
>
> (v) **Dust extractors, smoke filters, etc.**, fitted with various types of obstructing elements to reduce the speed of the particles in the gas stream, e.g., baffle lattes, partitions perforated with non-corresponding orifices, circular or spiral circuits fitted with baffles, and cones of superimposed baffle rings.
>
> [all emphasis in original.]

When worn over the stoma, the foam acts as a filter and humidifier for inhaled air. However, the examples of filters listed in EN 84.21 are incorporated into a device that moves the liquid or gas to be filtered. There are no examples in the EN that consist simply of the separating element or material as the filter. The Random House Dictionary of the English Language, the Unabridged Edition, (1973), defines apparatus as "1. A group of aggregate of instruments, machinery, tools, materials, etc., having a particular function or intended for a specific use. 2. Any complex instrument or mechanism for a particular purpose. 3. Any system or systematic organization of activities, functions, processes, etc., directed toward a specific goal: *the apparatus of government; espionage apparatus.* 4. *Physiol.* A group of structurally different organs working together in the performance of a particular function: *the digestive apparatus.*" The foam stoma filters are not incorporated into a machine. Nor do they constitute a filtering "apparatus" based on the definition above. Other than the packaging of the foam, there is nothing to distinguish the foam from other foam cut to shape. Both the Buchanan laryngectomy protectors and the Stomafoam squares are simply pieces of

foam worn over a stoma secured by textile ties or by adhesive; a dust mask, of sorts, for a stoma rather than for the nose and mouth.

In NY 858666, dated December 18, 1990, and in NY 867238, dated December 2, 1991, a dust mask composed of non-woven textile fabric was classified as an "other made up article" in subheading 6307.90, HTSUS. The instant foam stoma filters, which function exactly like a dust mask, are therefore also classified as articles of their material make-up in chapter 39. Therefore, the Stomafoam squares are classified in subheading 3919.90.50, HTSUS, the provision for "Self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of plastics, whether or not in rolls: Other: Other."

The Buchanan laryngectomy protector is a composite good of foam and textile materials. The foam accounts for most of the weight and all of the function of the article. It is therefore classified by GRI 3(b) in subheading 3926.90.98, HTSUS, the provision for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other."

The Romet laryngectomy filter cover is worn much like a necktie or cravat. It hides the stoma in a stylish way. It is therefore classified in subheading 6117.80.9510, HTSUS, the provision for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Of cotton."

HOLDING:

The Romet laryngectomy filter cover is classified in subheading 6117.80.9510, HTSUS, the provision for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Of cotton," in quota category 359.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Textile Status Report for Absolute Quotas*, available on the CBP website at www.cbp.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

The Stomafoam squares are classified in subheading 3919.90.50, HTSUS, the provision for "Self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of plastics, whether or not in rolls: Other: Other."

The Buchanan laryngectomy protector is classified in 3926.90.98, HTSUS, the provision for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other."

Duty free status under subheading 9817.00.96, HTSUS, is unaffected.

EFFECT ON OTHER RULINGS:

HQ 951654, dated July 2, 1992, is revoked.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

REVOCATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN WATERPROOF CLOGS

AGENCY: Bureau of Customs and Border Protection; Department of Homeland Security.

ACTION: Notice of revocation of two tariff classification ruling letters and revocation of treatment relating to the classification of certain waterproof clogs.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), this notice advises interested parties that Customs and Border Protection (CBP) is revoking two ruling letters relating to the tariff classification of certain waterproof clogs under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). CBP is also revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed actions was published on January 28, 2004, Vol. 38, No. 5, of the CUSTOMS BULLETIN. One comment was received in response to the notice. The comment identified a ruling on substantially similar merchandise.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 6, 2004.

FOR FURTHER INFORMATION CONTACT: Kelly Herman, Textiles Branch: (202) 572–8713.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Tile VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under sec-

tion 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625 (c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI, a notice proposing to revoke New York Ruling Letter (NY) J87291, dated September 10, 2003, which classified waterproof clogs in subheading 6401.99.30, HTSUSA, was published in the January 28, 2004, CUSTOMS BULLETIN, Volume 38, No. 5. One comment was received in response to the notice, identifying an additional ruling on merchandise that was substantially similar to that which was subject to the proposed revocation.

As stated in the notice of proposed revocation, the notice covered any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during the notice period.

Similarly, pursuant to section 625 (c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved in substantially identical transactions should have advised CBP during the notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY J87291, CBP ruled that a slip-on, clog-type shoe with a molded 100% rubber upper and outer sole (Item numbers AAW12540, 12541 and 12542) was classified in subheading 6401.99.3000, HTSUSA, which provides for "Waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes: Other footwear: Other: Designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather: Designed for use without closures."

In the recently identified Port Decision Letter (PD) H87387, CBP ruled that a similar slip-on, clog-type shoe with a molded 100% rubber upper and outer sole (style number 6070) was also classified in subheading 6401.99.3000, HTSUSA.

Based upon our analysis of the scope of the terms of subheadings 6401.99.3000, HTSUSA and 6401.99.8000, HTSUSA, the Legal Notes, and Treasury Decision (T.D.) 93–88, we have determined that the clogs subject to the two rulings above are properly classified in subheading 6401.99.8000, HTSUSA, the provision for "Waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes: Other footwear: Other: Other: Having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics (except footwear having foxing or a foxing-like band applied or molded at the sole and overlapping the upper)."

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY J87291, PD H87387 and any other ruling not specifically identified, to reflect the proper classification of the waterproof clogs according to the analysis contained in proposed Headquarters Ruling Letters (HQ) 966827 and HQ 966835, set forth as Attachments A and B, respectively, to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical merchandise.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

DATED: March 18, 2004

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966827
March 18, 2004
CLA–2 RR:CR:TE 966827 KSH
TARIFF NO.: 6401.99.8000

MS. LINDA BROADFORD
RALPH LAUREN FOOTWEAR
1895 J.W. Foster Blvd.
Canton, MA 02021

RE: Revocation of New York Ruling Letter (NY) J87291, dated September 10, 2003; Classification of certain waterproof clogs

DEAR MS. BROADFORD:

This is in response to your letter of October 27, 2003, in which you request reconsideration of New York Ruling Letter (NY) J87291, issued to you on September 10, 2003, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a slip-on, clog-type shoe with a molded 100% rubber upper and outer sole. The clogs have been identified by Item numbers AAW12540, 12541 and 12542. The different numbers signify different colors. The clogs were classified in subheading 6401.99.3000, HTSUSA, which provides for "Waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes: Other footwear: Other: Designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather: Designed for use without closures." You argue that inasmuch as the heels of one wearing the clogs would be exposed, they are not designed as protection against water, oil, grease or chemicals or cold or inclement weather. We have reviewed NY J87291 and found it to be in error. Therefore, this ruling revokes NY J87291.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY J87291 was published on January 28, 2004, in Vol. 38, Number 5, of the CUSTOMS BULLETIN.

FACTS:

One sample was submitted in conjunction with your request for reconsideration. The sample is identified as Style AAW12541. It is a slip-on, clog-type shoe with a molded 100% rubber upper and outer sole. The clog has a textile lining and a removable footbed insole. The wearer's heel would be completely exposed when worn.

ISSUE:

Whether the clog is classifiable as protective footwear under subheading 6401.99.3000, HTSUSA, or as waterproof footwear under subheading 6401.99.8000, HTSUSA.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (EN), constitute the official interpretation at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings.

At issue, essentially, is whether the instant clogs are designed to protect against mere penetration by liquids, or designed to be worn over or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather.

"Waterproof footwear" is defined in Additional U.S. Note 3 to chapter 64, HTSUSA, which states:

> For the purposes of heading 6401 "waterproof footwear" means footwear specified in the heading, designed to protect against penetration by water or other liquids, whether or not such footwear is primarily designed for such purposes.

The clog is clearly waterproof footwear. Subheading 6401.99, HTSUSA, provides for other waterproof footwear, other than that covering the ankle but not covering the knee, that is designed to be worn over or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather.

On November 17, 1993, in the Customs Bulletin, Volume 27, Number 46, CBP published Treasury Decision (T.D.) 93–88, which contains certain footwear definitions used by CBP import specialists to classify footwear. The footwear definitions were provided merely as guidelines and, although consulted here, are not to be construed as CBP rulings. With regard to "protection," T.D. 93–88 states, in pertinent part:

> Footwear is designed to be a "protection" against water, oil or cold or inclement weather only if it is substantially more of a "protection" against those items than the usual shoes of that type. For example, a leather oxford will clearly keep your feet warmer and drier than going barefoot, but they are not a "protection" in this sense. On the other hand the snow-jogger is the protective version of the non-protective jogging shoe.

Generally, open toe/open heel footwear is not designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather. T.D. 93–88 states:

> In "open" toe shoes, all or part of the front of the wearer's toes can be seen. In open heeled shoes, all or part of the back of the wearer's heel can be seen.

For footwear classification purposes, CBP interprets the "heel" to be the rearmost boney part of the human foot, the top of which is located just below the Achilles tendon.

As previously noted, examination of the sample clog revealed no raised ridge at the heel. Since all of part of the wearer's heel would be visible, the clog is open-heeled footwear. T.D. 93–88 provides examples of footwear designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather. Under the heading "Protection," it is stated in pertinent part that, footwear that is a "protection" against water includes:

> 4. Molded rubber clogs, which are the same shape as traditional Dutch wooden shoes. They are used in gardening on wet terrain.

Although it is a molded rubber clog, the clog is not in the same shape as traditional Dutch wooden shoes which have a closed heel. In light of the above analysis, and of the fact that the clogs constitute open-heeled footwear, we find that the clogs are not designed to be worn over or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather. See Headquarters Ruling Letter (HQ) 963224, dated March 22, 2003 (and compare HQ 965718, dated September 5, 2002).

HOLDING:

NY J87291, dated September 10, 2003, is hereby revoked.

The waterproof clog is classified in subheading 6401.99.8000, HTSUSA, the provision for "Waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes: Other footwear: Other: Other: Having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics (except footwear having foxing or a foxing-like band applied or molded at the sole and overlapping the upper)." The General Column 1 Rate of Duty is free.

In accordance with 19 U.S.C. 1625 (c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966835
March 18, 2004
CLA–2 RR:CR:TE 966835 KSH
TARIFF NO.: 6401.99.8000

MS. DEBI FRENCH
MARISOL INTERNATIONAL, LLC
4300 Highline Boulevard, Suite 150
Oklahoma City, OK 73108

RE: Revocation of Port Decision Letter (PD) H87387, dated February 8, 2002; Classification of certain waterproof clogs

DEAR MS. FRENCH:

This is in response to your letter of December 9, 2003, in which you request reconsideration, on behalf of your client Midwest Quality Glove of Chillicothe, MO, of Port Decision Letter (PD) H87387, issued to your client on February 8, 2002, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of slip-on, clog-type shoes with a molded 100% rubber upper and outer sole. The clogs are identified by style number 6070. The clogs were classified in subheading 6401.99.3000, HTSUSA, which provides for "Waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes: Other footwear: Other: Designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather: Designed for use without closures." You submit that the footwear is of the same design and nature as footwear described in Headquarters Ruling Letter (HQ) 963224, dated March 22, 2002, in which we determined that the footwear was classified in subheading 6401.99.8000, HTSUSA, which provides for for "Waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes: Other footwear: Other: Other: Having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics (except footwear having foxing or a foxing-like band applied or molded at the sole and overlapping the upper)." We have reviewed PD H87387 and found it to be in error. Therefore, this ruling revokes PD H87387.

FACTS:

Two samples were submitted in conjunction with your request for reconsideration. The samples are identified as style numbers 6070 and TG6073, the latter of which was the subject of, and correctly classified in, New York Ruling Letter (NY) K80201, issued to your client on November 12, 2003. The submitted samples are substantially similar, slip-on, clog-type shoes each with a molded 100% rubber upper and outer sole. The clogs have a textile

lining and a removable footbed insole. The wearer's heel would be partially exposed when worn.

ISSUE:

Whether the clog is classifiable as protective footwear under subheading 6401.99.3000, HTSUSA, or as waterproof footwear under subheading 6401.99.8000, HTSUSA.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (EN), constitute the official interpretation at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings.

At issue, essentially, is whether the instant clogs are designed to protect against mere penetration by liquids, or designed to be worn over or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather.

"Waterproof footwear" is defined in Additional U.S. Note 3 to chapter 64, HTSUSA, which states:

> For the purposes of heading 6401 "waterproof footwear" means footwear specified in the heading, designed to protect against penetration by water or other liquids, whether or not such footwear is primarily designed for such purposes.

The clog is clearly waterproof footwear. Subheading 6401.99, HTSUSA, provides for other waterproof footwear, other than that covering the ankle but not covering the knee, that is designed to be worn over or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather.

On November 17, 1993, in the Customs Bulletin, Volume 27, Number 46, CBP published Treasury Decision (T.D.) 93–88, which contains certain footwear definitions used by CBP import specialists to classify footwear. The footwear definitions were provided merely as guidelines and, although consulted here, are not to be construed as CBP rulings. With regard to "protection," T.D. 93–88 states, in pertinent part:

> Footwear is designed to be a "protection" against water, oil or cold or inclement weather only if it is substantially more of a "protection" against those items than the usual shoes of that type. For example, a leather oxford will clearly keep your feet warmer and drier than going barefoot, but they are not a "protection" in this sense. On the other hand the snow-jogger is the protective version of the non-protective jogging shoe.

Generally, open toe/open heel footwear is not designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather. T.D. 93–88 states:

> In "open" toe shoes, all or part of the front of the wearer's toes can be seen. In open heeled shoes, all or part of the back of the wearer's heel can be seen.

For footwear classification purposes, CBP interprets the "heel" to be the rearmost boney part of the human foot, the top of which is located just below the Achilles tendon.

As previously noted, examination of the sample clogs revealed a raised ridge at the heel. Although the heel ridge distinguishes the subject clog from those with a lower, or no, heel ridge, the heel of one using the subject clog would always be at least partially visible. In this regard the clogs are open-heeled footwear. T.D. 93–88 provides examples of footwear designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather. Under the heading "Protection," it is stated in pertinent part that, footwear that is a "protection" against water includes:

> 4. Molded rubber clogs, which are the same shape as traditional Dutch wooden shoes. They are used in gardening on wet terrain.

Although it is a molded rubber clog, the clog is not in the same shape as traditional Dutch wooden shoes which have a closed heel. In light of the above analysis, and of the fact that the clogs constitute open-heeled footwear, we find that the clogs are not designed to be worn over or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather. See HQ 963224, dated March 22, 2003 (and compare HQ 965718, dated September 5, 2002).

HOLDING:

PD H87387, dated February 8, 2002, is hereby revoked.

The waterproof clog is classified in subheading 6401.99.8000, HTSUSA, the provision for "Waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes: Other footwear: Other: Other: Having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics (except footwear having foxing or a foxing-like band applied or molded at the sole and overlapping the upper)." The General Column 1 Rate of Duty is free.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

19 CFR PART 177

REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF AL-PTBBA AND PARA-T-BUTYL BENZOIC ACID ALUMINUM SALT

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security

ACTION: Notice of revocation of two tariff classification ruling letters and treatment relating to the classification of AL-PTBBA and para-t-Butylbenzoic acid aluminum salt.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two rulings concerning the tariff classification of AL-PTBBA and para-t-Butylbenzoic acid aluminum salt, respectively, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocation was published on February 11, 2004, in Volume 38, Number 7, of the CUSTOMS BULLETIN. No comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after June 6, 2004.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, Commercial Rulings Division, (202) 572–8784.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share re-

sponsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, a notice was published in the February 11, 2004, CUSTOMS BULLETIN, Volume 38, Number 7, proposing to revoke New York Ruling Letter (NY) 867971, dated November 21, 1991, and NY B80857, dated February 18, 1997, and to revoke any treatment accorded to substantially identical merchandise. No comments were received in response to this notice.

In NY 867971 and in NY B80857, the merchandise was classified in subheading 2916.39.45, HTSUS, the provision for "Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic monocarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: Other: Other: Other: Products described in additional U.S. note 3 to section VI." It is now Customs position that one of the two names given for the substance in each of the rulings was not correctly identified. We are revoking both rulings to clearly identify the two substances and their respective CAS registry numbers in each ruling, and correctly classify each substance.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by Title VI, Customs is revoking any treatment it previously accorded to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Customs, pursuant to section 625(c)(1), is revoking NY 867971 and NY B80857, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 966773 and HQ 966774, which are set forth as Attachments "A" and "B" to this

notice. Additionally, pursuant to section 625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: March 18, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966773
March 18, 2004
CLA–2 RR:CR:GC 966773 AM
CATEGORY: CLASSIFICATION
TARIFF NO.: 2916.39.45; 2916.39.75

MR. A.J. SPATARELLA
KANEMATSU USA
114 West 47th Street
New York, N.Y. 10036

Re: AL-PTBBA, bis [4-(1,1-dimethylethyl) benzoato-o] hydroxy aluminum; Revocation of NY 867971

DEAR MR. SPATARELLA:

This is regarding New York Ruling Letter (NY) 867971, issued to you on November 21, 1991, classifying "AL-PTBBA also known as bis [4-(1,1-dimethylethyl) benzoato-o] hydroxy aluminum, CAS 13170–05–3," [sic] under the Harmonized Tariff Schedule of the United States (HTSUS), in subheading 2916.39.45, the provision for "Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic monocarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: Other: Other: Other: Products described in additional U.S. note 3 to section VI." We have now discovered that NY 867971 referred to two different substances, AL-PTBBA, CAS # 4067–14–5 and bis [4-(1,1-dimethylethyl) benzoato-o] hydroxy aluminum, CAS # 13170–05–3, each classified under different subheadings. We have reviewed NY 867971 and have determined that it must be revoked in order to correct and clarify the classification of the named products.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–82, 107 Stat. 2057, 2186), notice of the proposed revocation of NY 867971 was pub-

lished on February 11, 2004, CUSTOMS BULLETIN, Volume 38, Number 7. No comments were received in response to this notice.

FACTS

The product is a salt of an aromatic monocarboxylic acid. CAS Number 13170–05–3, which was used in reference to the product in NY 867971, is not listed in the chemical appendix whereas CAS Number 4067–14–5, which was not referenced in NY 867971, is listed in the chemical appendix to the HTSUS.

A review of **CAS # 13170–05–3** results in the following chemical names and formulae:

Aluminum, bis [4-(1,1-dimethylethyl)benzoato-kO]hydroxy- (TSCA, PICCS)
Aluminum, bis [4-(1,1-dimethylethyl)benzoato-O]hydroxy- (NDSL)
Bis [4-(tert-butyl)benzoato-O]hydroxyaluminium (English, French, German) (NDSL, EINECS)
bis [4-(terc-butil)benzoato-O]hidroxialuminio (Spanish) (EINECS)
Aluminium, bis [4-(1,1-dimethylethyl)benzoato-O]hydroxy- (AICS)
Bis [4-(1,1-dimethylethyl)benzoato-O]hydroxy aluminum (ECL, PICCS)
BIS [4-(1,1-DIMETHYLETHYL)BENZOATO-O] HYDROXY ALUMINUM (PICCS)
ALPTBB 300
Aluminum hydroxy-di-p-tert-butylbenzoate
Aluminum hydroxybis [4-(tert-butyl)benzoate]
Aluminum, bis (p-tert-butylbenzoato)hydroxy-
Aluminum, bis [4-(1,1-dimethylethyl)benzoato-O]-, hydroxide
Aluminum, bis [4-(1-1 dimethylethyl) benzoate-O]hydroxide
Bis (p-tert-butyl benzoate)hydroxyaluminum
Hydroxyaluminum bis (p-tert-butylbenzoate)
S 4030
Sandostab 4030
YK
YK (nucleation agent)
FORMULA: $C_{22}H_{27}AlO_5$

A search for **CAS #4067–14–5** results in the following chemical names and formulae:

Para-tert-butyl benzoic acid aluminum salt
Benzoic acid, 4-(1,1-dimethylethyl)-, aluminum salt (TSCA, NDSL, ENCS)
4-(1,1-Dimethylethyl)benzoate d'aluminium (French) (NDSL, EINECS)
aluminium 4-(1,1-dimethylethyl)benzoate (EINECS)
Aluminium-4-(1,1-dimethylethyl)benzoat (German) (EINECS)
4-(1,1-dimetiletil)benzoato de aluminio (Spanish) (EINECS)
Al 300
Al 300 (nucleating agent)
Aluminium p-tert-butylbenzoate
Aluminum 4-tert-butylbenzoate
Aluminum p-tert-butylbenzoate
APBB
Benzoic acid, p-tert-butyl-, aluminum salt
p-tert-Butylbenzoic acid aluminum salt
PTBBA-AL
FORMULA: $C_{11}H_{14}O_2.1:3Al$

ISSUE

What is the classification, in the HTSUS, of AL-PTBBA, bis [4-(1,1-dimethylethyl) benzoato-o] hydroxy aluminum, and products assigned CAS 13170–05–3 and CAS 4067–14–5?

LAW AND ANALYSIS

Merchandise imported into the United States is classified under the HTSUS. Classification under the HTSUS is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs.

In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The HTSUS provisions under consideration are the following:

2916	Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives:
	Aromatic monocarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives:
2916.39	Other:
	Other:
	Other:
2916.39.45	Products described in additional U.S. note 3 to section VI
2916.39.75	Other

Additional U.S. Note 3 to Section VI, HTSUS, provides:

> The term "products described in additional U.S. note 3 to section VI" refers to "any product not listed in the Chemical Appendix to the Tariff Schedule and--"
>
> (a) For which the importer furnishes the Chemical Abstracts Service (C.A.S.) registry number and certifies that such registry number is not listed in the Chemical Appendix to the Tariff Schedule; or

(b) Which the importer certifies not to have a C.A.S. registry number and not to be listed in the Chemical Appendix to the Tariff Schedule, either under the name used to make Customs entry or under any other name by which it may be known.

In NY 867971, the merchandise was identified by two different names, AL-PTBBA and bis [4-(1,1-dimethylethyl) benzoato-o] hydroxy aluminum. These are actually two different products. Only bis [4-(1,1-dimethylethyl) benzoato-o] hydroxy aluminum is assigned CAS # 13170–05–3, mentioned in the ruling, while AL-PTBBA is assigned CAS # 4067–14–5. CAS # 13170–05–3 is not listed in the Chemical Appendix but CAS # 4067–14–5 is so listed. Therefore, the classification for bis [4-(1,1-dimethylethyl) benzoato-o] hydroxy aluminum, CAS # 13170–05–3, and all other substances assigned this CAS number listed in the FACTS section of this ruling, is subheading 2916.39.45, the provision for "Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic monocarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: Other: Other: Other: Products described in additional U.S. note 3 to section VI." The classification for AL-PTBBA, CAS # 4067–14–5 and all other substances assigned this CAS number listed in the FACTS section of this ruling, is 2916.39.75, the provision for "Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic monocarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: Other: Other: Other: Other."

HOLDING

The classification for bis [4-(1,1-dimethylethyl) benzoato-o] hydroxy aluminum, CAS # 13170–05–3, and all other substances assigned this CAS number listed in the FACTS section of this ruling, is subheading 2916.39.45, the provision for "Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic monocarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: Other: Other: Other: Products described in additional U.S. note 3 to section VI."

The classification for AL-PTBBA, CAS # 4067–14–5, and all other substances assigned this CAS number listed in the FACTS section of this ruling, is 2916.39.75, the provision for "Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic monocarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: Other: Other: Other: Other."

EFFECT ON OTHER RULINGS

NY 867971 is REVOKED to reflect the correct classification of the two different products named.

In accordance with 19 U.S.C. § 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966774
March 18, 2004
CLA–2 RR:CR:GC 966774 AM
CATEGORY: CLASSIFICATION
TARIFF NO.: 2916.39.45, 2916.39.75

MR. JOSEPH J. CHIVINI
AUSTIN CHEMICAL COMPANY, INC.
1565 Barclay Blvd.
Buffalo Grove, IL 60089–4537

Re: para-t-Butylbenzoic acid aluminum salt; Bismethylethylbenzoatohydroxy aluminum, CAS 13170–05–3; Revocation of NY B80857

DEAR MR. CHIVINI:

This is regarding New York Ruling Letter (NY) B80857, issued to you on February 18, 1997, classifying "Para-t-Butyl benzoic acid aluminum salt, Bismethylethylbenzoatohydroxy aluminum, CAS 13170–05–3," (sic) under the Harmonized Tariff Schedule of the United States (HTSUS), in subheading 2916.39.45, the provision for "Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic monocarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: Other: Other: Other: Products described in additional U.S. note 3 to section VI." We have reviewed NY B80857 and have discovered that one of the chemical names used is not assigned the CAS number used therein.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–82, 107 Stat. 2057, 2186), notice of the proposed revocation of NY B80857 was published on February 11, 2004, CUSTOMS BULLETIN, Volume 38, Number 7. No comments were received in response to this notice.

FACTS

Customs Laboratory Report, NY20030419, dated July 10, 2003, analyzing a similar product, states, in pertinent part, the following:

Product Name:	p-tert-Butylbenzoic acid, aluminum salt
CAS Registry Name:	4-(1,1-Dimethylethyl)Benzoic Acid, Aluminum Salt

CAS Number:	4067–14–5 Which is listed in the chemical appendix (HTSUS 2003).
Stated use:	Not Provided
Report:	The product is a salt of an aromatic monocarboxylic acid . . .
Product Name:	Bismethylethylbenzoatohydroxy aluminum
CAS Registry Name:	BIS[94-91,1,-dimethyulethyl)benzoato-KO]Hydroxyaluminum
CAS Number:	13170–05–03 Which is not listed in the chemical appendix (HTSUS 2003).
Stated use:	Not provided
Report:	The product is a salt of an aromatic monocarboxylic acid . . .

The two product (sic) are different compounds with different CAS names and numbers.

A review of **CAS # 13170–05–3** results in the following chemical names and formulae:

Aluminum, bis[4-(1,1-dimethylethyl)benzoato-kO]hydroxy- (TSCA, PICCS)
Aluminum, bis[4-(1,1-dimethylethyl)benzoato-O]hydroxy- (NDSL)
Bis[4-(tert-butyl)benzoato-O]hydroxyaluminium (English, French, German) (NDSL, EINECS) bis[4-(terc-butil)benzoato-O]hidroxialuminio (Spanish) (EINECS)
Aluminium, bis[4-(1,1-dimethylethyl)benzoato-O]hydroxy- (AICS)
Bis[4-(1,1-dimethylethyl)benzoato-O]hydroxy aluminum (ECL, PICCS)
BIS[4-(1,1-DIMETHYLETHYL)BENZOATO-O] HYDROXY ALUMINUM (PICCS)
ALPTBB 300
Aluminum hydroxy-di-p-tert-butylbenzoate
Aluminum hydroxybis[4-(tert-butyl)benzoate]
Aluminum, bis(p-tert-butylbenzoato)hydroxy-
Aluminum, bis[4-(1,1-dimethylethyl)benzoato-O]-, hydroxide
Aluminum, bis[4-(1-1 dimethylethyl) benzoate-O]hydroxide
Bis(p-tert-butyl benzoate)hydroxyaluminum
Hydroxyaluminum bis(p-tert-butylbenzoate)
S 4030
Sandostab 4030
YK
YK (nucleation agent)
FORMULA: $C_{22}H_{27}AlO_5$

A search for CAS #4067–14–5 results in the following chemical names and formulae:

para-tert-Butylbenzoic acid aluminum salt
Benzoic acid, 4-(1,1-dimethylethyl)-, aluminum salt (TSCA, NDSL, ENCS)
4-(1,1-Dimethylethyl)benzoate d'aluminium (French) (NDSL, EINECS)
aluminium 4-(1,1-dimethylethyl)benzoate (EINECS)
Aluminium-4-(1,1-dimethylethyl)benzoat (German) (EINECS)
4-(1,1-dimetiletil)benzoato de aluminio (Spanish) (EINECS)
Al 300
Al 300 (nucleating agent)
Aluminium p-tert-butylbenzoate
Aluminum 4-tert-butylbenzoate
Aluminum p-tert-butylbenzoate
APBB
Benzoic acid, p-tert-butyl-, aluminum salt
p-tert-Butylbenzoic acid aluminum salt
PTBBA-AL
FORMULA: $C_{11}H_{14}O_2.1:3Al$

ISSUE

Where are para-t-Butylbenzoic acid, aluminum salt, CAS 4067–14–5, and Bismethylethylbenzoatohydrozy aluminum, CAS 13170–05–03, classified in the HTSUS?

LAW AND ANALYSIS

Merchandise imported into the United States is classified under the HTSUS. Classification under the HTSUS is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs.

In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The HTSUS provisions under consideration are the following:

2917 Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives:

Aromatic monocarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives:

2917.39 Other:

Other:

Other:

2916.39.45 Products described in additional U.S. note 3 to section VI

2916.39.75 Other

Additional U.S. Note 3 to Section VI, HTSUS provides:

The term "products described in additional U.S. note 3 to section VI" refers to "any product not listed in the Chemical Appendix to the Tariff Schedule and—"

(a) For which the importer furnishes the Chemical Abstracts Service (C.A.S.) registry number and certifies that such registry number is not listed in the Chemical Appendix to the Tariff Schedule; or

(b) Which the importer certifies not to have a C.A.S. registry number and not to be listed in the Chemical Appendix to the Tariff Schedule, either under the name used to make Customs entry or under any other name by which it may be known.

In NY B80857, the merchandise was identified by two different names, para-t-Butylbenzoic acid aluminum salt and Bismethylethylbenzoatohydroxy aluminum. We have now discovered that these are two different substances. The merchandise was also identified by CAS # 13170-05–3, which corresponds to the chemical name Bismethylethylbenzoatohydroxy aluminum. CAS # 13170–05–3 is not listed in the Chemical Appendix. Bismethylethylbenzoatohydroxy aluminum, and all of the substances with the chemical names listed in the FACTS section of this document, *supra*, under CAS # 13170–05–3, are classified in subheading 2916.39.45, the provision for "Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic monocarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: Other: Other: Other: Products described in additional U.S. note 3 to section VI."

The correct CAS # for para-t-Butylbenzoic acid aluminum salt is 4067–14–5, which is listed in the chemical appendix. Para-t-Butylbenzoic acid aluminum salt, and all of the substances with the chemical names listed in the FACTS section of this document, *supra*, under CAS # 4067–14–5, are classified in subheading 2916.39.75, the provision for "Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic monocarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: Other: Other: Other: Other."

HOLDING

Bismethylethylbenzoatohydroxy aluminum, CAS # 13170–05–3, is classified in subheading 2916.39.45, the provision for "Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or

nitrosated derivatives: Aromatic monocarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: Other: Other: Other: Products described in additional U.S. note 3 to section VI."

Para-t-Butylbenzoic acid aluminum salt, CAS # 4067–14–5, is classified in subheading 2916.39.75, the provision for "Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic monocarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: Other: Other: Other: Other."

EFFECT ON OTHER RULINGS

NY B80857 is REVOKED.

In accordance with 19 U.S.C. § 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

19 CFR PART 177

REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF TERMINAL BLOCKS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of a tariff classification of ruling letters and treatment relating to the classification of certain terminal blocks.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182,107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking two ruling letters relating to the tariff classification, under the Harmonized Tariff Schedule of the United States, (HTSUS), of terminal blocks. Similarly, CPB is revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed actions was published in the Customs Bulletin on February 4, 2004. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 6, 2004.

FOR FURTHER INFORMATION CONTACT: Robert Dinerstein, General Classification Branch, at (202) 572–8721.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(1)), on February 4, 2004, a notice was published in the Customs Bulletin, Volume 38, Number 6, proposing to revoke New York Ruling Letters ("NY") F86670 and NY F86672, dated June 19, 2000, regarding the classification of terminal blocks. No comments were received in response to the notice.

As stated in the proposed notice, although CBP is specifically referring to NY F86670 and NY F86672, this notice covers any rulings on this merchandise that may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. § 1625 (c)(2)), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUS. Any person involved with substantially identical merchandise should advise CBP during this notice period. An im-

porter's failure to advise CBP of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY F86670, NY F86672, and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter (HQ) 966674 (Attachment). Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions that are contrary to the determination set forth in this notice.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

DATED: March 23, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966674
March 23, 2004
CLA–2 RR:CR:GC 966674 RSD
CATEGORY: Classification
TARIFF No. 8536.90.40

MARK C. JOYE, ESQ.
JAIME A. JOINER, ESQ.
BAKER & HOSTETLER, LLP
1000 Louisiana, Suite 2000
Houston, Texas 77002–5009

RE: Revocation of NY F86670 and NY F86672; Terminal Blocks for voice and data telecommunications

DEAR MR. JOYE AND MS. JOINER:

This is in response to your letter dated July 18, 2003, on behalf of Krone, Inc., and Krone Comunicaciones S.A. de V.V. ("Krone-Mexico") requesting reconsideration of New York Ruling Letters NY F86670 dated June 19, 2000, and NY F86672 dated June 19, 2000, concerning the tariff classification of two types of terminal blocks. The National Commodity Specialist Division forwarded your letter with the accompanying submissions to our office. We also received samples of the two terminal blocks under consideration.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North

American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY F86670 and NY F86672, as described below, was published in the Customs Bulletin on February 4, 2004. No comments were received in response to the notice.

FACTS:

The subject merchandise consists of two voice and data telecommunication products that are referred to as terminal blocks. The two products are 1) 200-Pair Collocation Blocks (product number 6637 1 180–49) (NY F86670) and 2) Feed Through Termination Blocks (product number 6631 2 135–05) (NY F86672).

The 200-Pair Collocation Blocks are pre-terminated assemblies (connecting blocks) with a special disconnect feature that are pre-terminated to an industry standard high pair count (50-pin) female (socket) cable connectors. This feature allows for the rapid connection and/or breakout of telecommunication equipment circuits inside a building. Normally, these blocks would be used to provide a connection point for cables coming from telecommunication or computer electronic equipment, so that the cables could be connected, in turn, to the user circuits in an equipment room. The plastic blocks are mounted in a metal bracket with "Velcro" cable straps that help relieve strain, and a ground lug to attach to the electrical building ground, if it is required by the electrical building codes where they are installed. The special disconnect feature allows a repairperson to test a circuit without having to physically remove a cable from the block. This is achieved with the use of a 2-piece contact inside the blocks that can be opened by using special interface cords.

The Feed Through Termination Blocks ("FT") are connecting blocks that allow for the field termination of telecommunication cable conductors for voice or data circuits in an industry standard 25-pair group. The initials "FT" are used to designate the term for "feed through" which is the type of one-piece metal contact used in the block. The block would normally be used to provide a connection point for cables coming from a telephone or a computer jack at the user end, so that they could be connected, in turn, to a computer or a telephone circuit. It has a plastic housing and a base that allows it to mount mounting hardware, and it is color-coded in accordance with industry standards for using 4 pair (8 conductor) cables. This block does not actively use electricity, but only acts as a passive connection.

ISSUE:

Are the two terminal blocks classified as electrical apparatus for switching or protecting electric circuits . . . terminals in subheading 8536.90.40, HTSUS, or in subheading 8536.90.80, HTSUS, as electric apparatus for switching for protecting electrical circuits . . . other?

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. GRI 3(a) provides in pertinent part that where goods are, prima facie, classifiable under two or more headings, the heading which provides the most specific description

shall be preferred to headings providing a more general description. GRI 4 and GRI 5 are not applicable here. GRI 6 provides in pertinent part that the classification of goods in the subheadings of a heading shall be determined according to the above rules, on the understanding that only subheadings at the same level are comparable.

The Harmonized Commodity Description And Coding System Explanatory Notes (EN's) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the EN's provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system. Customs believes the EN's should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The HTSUS provisions under consideration are as follows:

8536	Electrical apparatus for switching or protecting electrical circuits, or for making connection to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1000 V:
8536.90	Other apparatus:
8536.90.40	Terminals, electrical splices and electrical couplings; wafer probers.
* * * * * * * * *	
8536.90.80	Other.
* * * * * * * * *	

Section (III) of EN 85.36 concerns "**APPARATUS FOR MAKING CONNECTIONS TO OR IN ELECTRICAL CIRCUITS.**" The EN states that this apparatus is used to connect together the various parts of an electrical circuit: Section (III)(B) is entitled "**Other connectors, terminals, terminal strips, etc.**" It provides that:

> These include small squares of insulating material fitted with electrical connectors (dominoes), terminals which are metal parts intended for the reception of conductors, and small metal parts designed to be fitted on the end of electrical wiring to facilitate electrical connection (spade terminals, crocodile clips, etc.).
>
> Terminal strips consist of strips of insulating material fitted with a number of metal terminal or connectors to which electrical wiring can be fixed. The heading also covers tag strips or panels; these consist of a number of metal tags set in insulating material so that electric wires can be soldered to them. Tag strips are used in radio or other electrical apparatus.

The two items under consideration, the 200-pair collocation blocks and the feed through termination blocks, are both types of terminal blocks. The issue that must be resolved is whether terminal blocks should be classified as electrical apparatus for switching or protecting electric circuits...terminals in subheading 8536.90.40, HTSUS, or in subheading 8536.90.80, HTSUS, as electric apparatus for switching for protecting electrical circuits . . . other.

A tariff term that is not defined in the HTSUS or in the ENs is construed in accordance with its common and commercial meanings, which are presumed to be the same. Nippon Kogasku (USA) Inc. v. United States, 69 CCPA 89, 673 F. 2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. C.J. Tower & Sons v. United States, 69 CCPA 128, 673 F. 2d 1268 (1982).

To supplement the description of the term terminal provided in the ENs, you have presented a definition from the Merriam-Webster Online Dictionary for the word "terminal" as:

> A device attached to the end of a wire or cable or to an electrical apparatus for convenience in making connections.

The phrase "terminal blocks" is not defined in the HTSUS or ENs. You cite a web site, www.cutler-hammer.eaton.com/unsecure/html/101basics/Module18/Output/WhatYouWillLearn.html, which defines "terminal blocks" as:

> Terminal blocks are modular, insulated blocks that secure two or more wires together and consist of an insulation body and a clamping device. Their flexibility allows wiring to be centralized and makes it easier to maintain complex control circuits.
>
> A terminal block secures two or more wires together to set up a circuit. Basically, there are just two parts: an insulating body and the current carrying parts.

The same web site continues:

> Imagine the hassle involved with running wire from each device to the next, thus creating spiderweb of wiring. Instead, put a terminal block assembly inside a centralized control panel. You have now centralized and reduced the wiring so that a maintenance crew can quickly assess the status of the system and verify its performance . . .
>
> When changes in the circuit need to be made, terminal blocks can be easily added or pulled off the rail without disrupting other wire terminations.
>
> Along with reducing the complexity of control wiring, the plastic bodies of terminal blocks also prevent shorts and therefore provide greater safety to installers and maintenance crews.

Based on the information that was submitted, we find that terminal blocks are devices at the end of a wire or a cable used for connecting electrical circuits together. Accordingly, consistent with the description provided in EN 85.36, Section (III)(B), we conclude that terminal blocks can be considered as electrical terminals. We note that subheading 8536.90.40 HTSUS specifically includes electrical terminals. In contrast, the alternative tariff provision under consideration, subheading 8536.90.80, HTSUS, is a general basket provision for "Other." Thus subheading 8536.90.40, HTSUS provides a more specific description of the merchandise than subheading 8536.90.80, HTSUS.

In reaching this conclusion, we are following the holding in NY H82293 dated July 2, 2001. In NY H82293, Customs considered the classification of binding post blocks, items that were identified as jumpering devices used in feeder distribution and cross-connect application for building entrance ter-

minals. The products consisted of a terminal block and pairs of electrical wiring. Customs determined that the applicable subheading for the binding post blocks was 8536.90.40, HTSUS. In essence, Customs held that the terminal blocks were classified as terminals in subheading 8536.90.40, HTSUS.

Accordingly, we conclude that the subject merchandise, the two types of terminal blocks, are classified in subheading 8536.90.40, HTSUS, as: "Electric apparatus for switching or protecting electric circuits, or for making connection to or in electrical circuits . . . : Other apparatus: Terminals, electrical splices and electrical couplings; wafer probers."

HOLDING:

Pursuant to GRI 6, the subject terminal boxes are classified in subheading 8536.90.40, HTSUS as "Electric apparatus for switching for protecting electric circuits, or for making connection to or in electrical circuits . . . for voltage not exceeding 1,000V: Other apparatus: Terminals, electrical splices and electrical couplings; wafer probers."

EFFECT ON OTHER RULINGS:

NY F866670 dated June 19, 2000 and NY F86672 dated June 19, 2000 are revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

19 CFR PART 177

PROPOSED REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF INDUSTRIAL SMOKING/COOKING APPARATUS

AGENCY: U. S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of ruling letters and treatment relating to tariff classification of industrial smoking/cooking apparatus.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings relating to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of industrial smoking/cooking apparatus, and to revoke any treatment Customs has previously accorded to substantially identical transactions. These articles are used for the industrial preparation of meat products utilizing dry heat and

wet heat produced by an external source of steam. Customs invites comments on the correctness of the proposed action.

DATE: Comments must be received on or before May 7, 2004.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C. 20220, during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 572–8779.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke two rulings relating to the tariff classification of industrial smoking/cooking apparatus. Although in this notice Customs is specifically referring to two rulings, HQ 959217 and HQ 959485, this notice covers any rulings

on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the ones identified. No further rulings have been identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ 959217, dated August 15, 1996, an industrial hot smoker/cooker was held to be classifiable as an industrial furnace or oven, in subheading 8417.80.00, HTSUS. HQ 959217 is set forth as "Attachment A" to this document. In HQ 959485, dated November 13, 1996, a smokehouse or steam-operated apparatus for the commercial preparation of meat products, was held to be similarly classifiable. HQ 959485 is set forth as "Attachment B" to this document. These rulings were based on Customs belief that the apparatus was within the common and commercial meaning of the terms "furnace" and "oven" for purposes of heading 8417.

It is now Customs position that these articles are not furnaces or ovens for tariff purposes, but are classifiable in subheading 8419.81.90, HTSUS, as other machinery, whether or not electrically heated, for the treatment of materials by a change of temperature such as heating or cooking. Pursuant to 19 U.S.C. 1625(c)(1)), Customs intends to revoke HQ 959217 and HQ 959485, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis in HQ 966949 and HQ 966950, which are set forth as "Attachment C" and "Attachment D" to this document, respectively. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment it previously accorded to substantially identical transactions. Before taking this

action, we will give consideration to any written comments timely received.

DATED: March 23, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 959217
AUGUST 15, 1996
CLA–2 RR:TC:MM 959217 JAS
CATEGORY: Classification
TARIFF NO.: 8417.80.00

PORT DIRECTOR OF CUSTOMS
110 S. 4th. St.
Minneapolis, MN 55401

RE: PRD 3501–95–100086; Hot Air Smoking and Baking Machine for Meats, Walk-In, Steam Heated Industrial Oven for Cooking Poultry and Other Meats; Oven, Common Meaning, C.D. 3141; Heading 8419, Industrial Machinery for Heating and Cooking

DEAR PORT DIRECTOR:

This is our decision on Protest 3501–95–100086, filed against your classification of an industrial-type combination smoker/cooker from Germany. The entry was liquidated on January 13, 1995, and this protest was timely filed on March 9, 1995.

FACTS:

The merchandise under protest is the VEMAG Aeromat, a combined hot smoker/cooker used in the industrial preparation of turkey and other poultry meats. Submitted literature describes a walk-in chamber with sides, roof and door of polyurethane insulated base metal, and a chromium-nickel steel sheet floor. Utilizing a humidifier and air circulating fan with a range of between 10 degrees Celcius above ambient temperature and 95 degrees C, the apparatus heats the meat by means of steam passing through a heat exchanger. Apparatus of this type can also be equipped with a resistance heater powered by an electric current, but this type is not the subject of this protest. The VEMAG Aeromat is advertized for use in redding (browning), drying, smoking, boiling, spraying or hot air cooking, all in one operation. An optional heating system, that does not appear to be a part of this importation, permits baking at temperatures up to 140 degrees Celcius.

The machinery was entered under a provision in heading 8419, Harmonized Tariff Schedule of the United States (HTSUS), for machinery, whether or not electrically heated, for the treatment of materials by a process involv-

ing a change of temperature such as heating, cooking, etc. Your office determined that this apparatus utilizes heat generated by steam and, therefore, is nonelectric. The entry was liquidated under a provision in HTS heading 8417 for nonelectric industrial furnaces and ovens. The importer/protestant maintains the merchandise is precluded from heading 8417 as it is electrically operated. However, no claim is made under HTS heading 8514, a provision for industrial or laboratory electric furnaces and ovens. The literature does not support protestant's claim and refers only to the fact that the Vemag Aeromat utilizes steam to generate heat.

The provisions under consideration are as follows:

8417	Industrial or laboratory furnaces and ovens, including incinerators, nonelectric, and parts thereof:
8417.80.00	Other . . . the 1994 rate of duty
* * * *	
8419	Machinery . . . whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting...other than of a kind used for domestic purposes . . . :
8419.81	Other machinery, plant or equipment:
8419.81.50	Other cooking stoves, ranges and ovens . . . Free

ISSUE:

Whether the VEMAG Aeromat is a nonelectric industrial oven of heading 8417.

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. See T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The **ENs** at p. 1173 exclude the following from heading 84.17: (g) Industrial or laboratory furnaces and ovens, including those for the separation of irradiated nuclear fuel by pyrometallurgical processes (heading 84.17 or 85.14, as the case may be). **ENs** at p. 1168 state only that heading 84.17 covers non-electrical industrial or laboratory furnaces and ovens, designed for the production of heat in chambers at high or fairly high temperatures by the combustion of fuel. The heading includes steam heated ovens. These notes are not helpful in clarifying the scope of heading 8417.

For heading 8417 purposes, the terms "furnace" and "oven" are not defined in the text of the HTSUS or in the **ENs**. In such cases tariff terms are to be

determined in accordance with their common and commercial meanings, which are presumed to be the same. Circumscribed only by the requirements that they be industry or laboratory types and nonelectric, an oven is a heated chamber or other enclosure used for baking, heating, drying or hardening. See **F. L. Smidth & Company v. United States**, 59 Cust. Ct. 276, C.D. 3141 (1967), in which the Customs Court established the common meaning of the term "oven" and determined that a kiln was within this common meaning.

HOLDING:

Under the authority of GRI 1, the VEMAG Aeromat is provided for in heading 8417. It is classifiable in subheading 8417.80.00, HTSUS.

The protest should be DENIED. In accordance with Section 3A(11)(b) of Customs Directive 099 3550–065, dated August 4, 1993, Subject: Revised Protest Directive, you should mail this decision, together with the Customs Form 19, to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry or entries in accordance with the decision must be accomplished prior to mailing the decision. Sixty days from the date of the decision the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS and to the public via the Diskette Subscription Service, the Freedom of Information Act and other public access channels.

Marvin Amernick for JOHN DURANT,
Director,
Tariff Classification Appeals Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 959485
NOVEMBER 13, 1996
CLA–2 RR:TC:MM 959485 JAS
CATEGORY: Classification
TARIFF NO.: 8417.80.00

PORT DIRECTOR OF CUSTOMS
6747 Engle Road
Middleburg Heights, OH 44130–7939

RE: PRD 4101–96–100224; Smokehouse Used in Meat Processing Plant; Steam Heated Oven Suitable for Hot and Cold Smoking, Cooking and Drying; Machinery for the Treatment of Materials by a Process Involving a Change of Temperature, Heading 8419; *Stella D'Oro Biscuit Co. v. U.S., F.L. Smidth & Company v. U.S.*, HQ 959379, HQ 959754

DEAR PORT DIRECTOR:

This is our decision on Protest 4101–96–100224, filed against your classification of a smokehouse from Germany. The entry was liquidated on January 12, 1996, and this protest timely filed on April 10, 1996. In preparing this decision, consideration was given to a supplemental submission from counsel for the protestant, dated May 31, 1996.

FACTS:

The merchandise in issue is described as a steam-operated commercial oven used in large scale production of meat products such as sausage, pepperoni, prosciuto, etc. It is designed to operate at temperatures ranging from 70 degrees to 200 degrees Fahrenheit and is used in heating, cooking, roasting, evaporating, steaming, drying and cooling applications.

The oven was entered under a duty-free provision in heading 8419, Harmonized Tariff Schedule of the United States (HTSUS), for other cooking stoves, ranges and ovens which are machinery, whether or not electrically heated, for the treatment of materials by a process involving a change of temperature. You determined that the smokehouse was more appropriately described by the terms of HTS heading 8417, as an industrial oven.

The heading 8419 claim advanced by counsel for the protestant is based on the assertion that notwithstanding the principal function of the smokehouse is to heat/cook foods because it is designed to maintain a temperature of between 50 and 200 degrees Fahrenheit (10 to 93 degrees Celsius), the unit also has the capability of completing the processing of food in the chamber by cooling at temperatures at or near freezing (32 degrees F). This is not a function appropriate to industrial ovens of heading 8417. Counsel maintains that the smokehouse is described both by the terms of heading 8417 and the terms of heading 8419, and that the apparatus operates at temperatures much lower than those required for goods of heading 8417.

The provisions under consideration are as follows:

8417	Industrial or laboratory furnaces and ovens, including incinerators, nonelectric, and parts thereof:
8417.80.00	Other . . . the 1995 rate of duty
	* * * *
8419	Machinery . . . whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting...other than of a kind used for domestic purposes...:
8419.81	Other machinery, plant or equipment:
8419.81.50	Other cooking stoves, ranges and ovens . . . Free

ISSUE:

Whether the smokehouse, as described, is an industrial oven for tariff purposes.

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description And Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining

the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. See T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The **ENs** at p. 1173 exclude the following from heading 84.19: (g) Industrial or laboratory furnaces and ovens, including those for the separation of irradiated nuclear fuel by pyrometallurgical processes (heading 84.17 or 85.14, as the case may be). **ENs** at p. 1168 state only that heading 84.17 covers non-electrical industrial or laboratory furnaces and ovens, designed for the production of heat in chambers at high or fairly high temperatures by the combustion of fuel. Specific operating temperatures or a range of temperatures are not indicated. While these notes are not helpful in clarifying the scope of heading 8417, it is clear that the provision for furnaces and ovens is to take precedence over a less specific provision for other machinery, plant or equipment. This conclusion was first stated in ***Stella D'Oro Biscuit Co. v. United States***, 79 Cust. Ct. 28, C.D. 4709 (1977), with respect to identical provisions under the Tariff Schedules of the United States, the HTSUS predecessor tariff code.

For purposes of heading 8417, the terms "furnace" and "oven" are not defined in the text of the HTSUS or in the **ENS**. In such cases tariff terms are to be determined in accordance with their common and commercial meanings, which are presumed to be the same. Circumscribed only by the requirements that they be industry or laboratory types and nonelectric, an ***oven*** is a heated chamber or other enclosure used for baking, heating, drying or hardening. See ***F.L. Smidth & Company v. United States***, 59 Cust. Ct. 276, C.D. 3141 (1967), in which the Customs Court established the common meaning of the term "oven" and determined that a kiln was within this common meaning. See HQ 959379, dated August 20, 1996, aff'd. by HQ 959754, dated October 10, 1996.

HOLDING:

Under the authority of GRI 1, the smokehouse is provided for in heading 8417. It is classifiable in subheading 8417.80.00.

The protest should be DENIED. In accordance with Section 3A(11)(b) of Customs Directive 099 3550–065, dated August 4, 1993, Subject: Revised Protest Directive, you should mail this decision, together with the Customs Form 19, to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry or entries in accordance with the decision must be accomplished prior to mailing the decision. Sixty days from the date of the decision the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS and to the public via the Diskette Subscription Service, the Freedom of Information Act and other public access channels.

Marvin M. Amernick for JOHN DURANT,
Director,
Tariff Classification Appeals Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966949
CLA–2 RR:CR:GC 966949 JAS
CATEGORY: Classification
TARIFF NO.: 8419.81.90

WILLIAM L. GRIFFIN COMPANY
7830 12th Ave. South
Minneapolis, MN 55425

RE: VEMAG Aeromat, Smoker/Cooker for Industrial Preparation of Meat Products; HQ 959217 Revoked

DEAR SIRS:

HQ 959217, dated August 15, 1996, denied Protest 3501–95–100086, which you filed with the Port Director of Customs, Minneapolis, MN, on behalf of Robert Reiser Company, Inc., Canton, MA. This decision classified the VEMAG Aeromat combined hot smoker/cooker under subheading 8417.80.00, Harmonized Tariff Schedule of the United States (HTSUS), as other industrial or laboratory furnaces and ovens. We have reconsidered the classification in HQ 959217 and now believe that it is incorrect. Any liquidation or reliquidation of the entry or entries in Protest 3501–95–100086 will not be affected by this ruling, which sets forth the correct classification.

FACTS:

As described in HQ 959217, the VEMAG Aeromat, is a combined hot smoker/cooker used in the industrial preparation of turkey and other poultry meats. Submitted literature describes a walk-in chamber with sides, roof and door of polyurethane insulated base metal, and a chromium-nickel steel sheet floor. Utilizing a humidifier and air circulating fan with a range of between 10 degrees Celcius above ambient temperature and 95 degrees C, the apparatus heats the meat by means of steam passing through a heat exchanger. Apparatus of this type can also be equipped with a resistance heater powered by an electric current, but this type is not the subject of this protest. The VEMAG Aeromat is advertized for use in redding (browning), drying, smoking, boiling, spraying or hot air cooking, all in one operation. An optional heating system, that does not appear to be a part of this importation, permits baking at temperatures up to 140 degrees Celcius.

The provisions under consideration are as follows:

8417	Industrial or laboratory furnaces and ovens, including incinerators, nonelectric, and parts thereof:
8417.80.00	Other
* * * *	
8419	Machinery . . . whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting . . . other than of a kind used for domestic purposes . . . :

8419.81	Other machinery, plant or equipment:
8419.81.50	Other cooking stoves, ranges and ovens
8419.81.90	Other

ISSUE:

Whether the VEMAG Aeromat is furnace or oven of heading 8417.

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUS and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

HQ 959217 stated that the 8417 ENs were not helpful in clarifying the scope of that heading. It was further stated that the Aeromat appeared substantially similar to a kiln which was encompassed within the common and commercial meanings of the terms "furnace" and "oven" for tariff purposes. Thus, the conclusion followed that the Aeromat was also described by heading 8417. However, we note that the 8417 ENs do not distinguish between wet and dry heat, nor do they list operating temperatures for ovens of that heading. In addition, new and more precise sources of information now available to us indicates that as a class or kind smokehouses generally heat/cook using dry heat and wet heat produced by an external source of steam. The latter produces humidity which is necessary for fermentation, a curing process that liberates a culture which induces a chemical reaction in the meat. This appears to be part of the cooking process. Additionally, these sources also indicate that the term "oven" is restricted to apparatus that heat/cook using only dry heat. Upon careful consideration of all the available evidence, it now appears that the VERMAG Aeromat is not an oven, either under heading 8417 or heading 8419, but is other machinery of 8419.

HOLDING:

Under the authority of GRI 1, the VEMAG Aeromat is provided for in heading 8419. It is classifiable in subheading 8419.81.90, HTSUS. HQ 959217 is revoked.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966950
CLA–2 RR:CR:GC 966950 JAS
CATEGORY: Classification
TARIFF NO.: 8419.81.90

THOMAS J. O'DONNELL
O'DONNELL, BYRNE & WILLIAMS
20 N. Wacker Drive, Suite 1416
Chicago, IL 60606

RE: Shroter Smokehouse, Smoker/Cooker for Industrial Preparation of Meat Products; HQ 959485 Revoked

DEAR SIR:

HQ 959485, dated November 13, 1996, denied Protest 4104–96–100224, which you filed with the Port Director of Customs, Middleburg Hts., OH., on behalf of Doskocil Foods, Inc., Jefferson, WI. This decision classified the Shroter Peperroni smokehouse under subheading 8417.80.00, Harmonized Tariff Schedule of the United States (HTSUS), as other industrial or laboratory furnaces and ovens. We have reconsidered the classification in HQ 959485 and now believe that it is incorrect. Any liquidation or reliquidation of the entry or entries in Protest 4104–96–100224 will not be affected by this ruling, which sets forth the correct classification.

FACTS:

In HQ 959485, the Shroter Smokehouse was described as a steam-operated commercial oven used in large scale production of meat products such as sausage, pepperoni, prosciutto, etc. It is designed to operate at temperatures ranging from 70 degrees to 200 degrees Fahrenheit and is used in heating, cooking, roasting, evaporating, steaming, drying and cooling applications.

The claim you advanced in this protest under heading 8419, HTSUS, as other machinery for the treatment of materials by a process involving a change of temperature, was based on the assertion that notwithstanding the principal function of the smokehouse is to heat/cook foods because it is designed to maintain a temperature of between 50 and 200 degrees Fahrenheit (10 to 93 degrees Celsius), the unit also has the capability of completing the processing of food in the chamber by cooling at temperatures at or near freezing (32 degrees F). You argued this is not a function appropriate to industrial ovens of heading 8417.

The provisions under consideration are as follows:

8417	Industrial or laboratory furnaces and ovens, including incinerators, nonelectric, and parts thereof:
8417.80.00	Other

* * * *

8419	Machinery . . . whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting . . . other than of a kind used for domestic purposes . . . :
8419.81	Other machinery, plant or equipment:
8419.81.50	Other cooking stoves, ranges and ovens
8419.81.90	Other

ISSUE:

Whether the Shroter Smokehouse is a furnace or oven of heading 8417.

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUS and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

HQ 959485 stated that the 8417 ENs were not helpful in clarifying the scope of that heading. It was further stated that the Shroter appeared substantially similar to a kiln which was encompassed within the common and commercial meanings of the terms "furnace" and "oven" for tariff purposes. Thus, the conclusion followed that the Shroter was also described by heading 8417. However, we note that the 8417 ENs do not distinguish between wet and dry heat, nor do they list operating temperatures for ovens of that heading. In addition, new and more precise sources of information now available to us indicates that as a class or kind smokehouses generally heat/cook using dry heat and wet heat produced by an external source of steam. The latter produces humidity which is necessary for fermentation, a curing process that liberates a culture which induces a chemical reaction in the meat. This appears to be part of the cooking process. Additionally, these sources also indicate that the term "oven" is restricted to apparatus that heat/cook using only dry heat. Upon careful consideration of all the available evidence, it now appears that the Shroter Smokehouse is not an oven, either under heading 8417 or heading 8419, but is other machinery of 8419.

HOLDING:

Under the authority of GRI 1, the Shroter Smokehouse is provided for in heading 8419. It is classifiable in subheading 8419.81.90, HTSUS. HQ 959485 is revoked.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Slip Op. 04–25

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

CARGILL, INCORPORATED, PLAINTIFF, v. UNITED STATES, DEFENDANT.

Court No. 00–04–00189

Plaintiff, Cargill, Incorporated ("Cargill") moves pursuant to USCIT R. 56 for summary judgment on the ground that there is no genuine issue as to any material facts. Defendant cross-moves for summary judgment seeking an order dismissing the case.

Held: Plaintiff's motion for summary judgment is denied. Defendant's cross-motion for summary judgment is granted.

Dated: March 18, 2004

Neville Peterson LLP (*Michael K. Tomenga*, *George W. Thompson* and *Julia S. Padierna-Peralta*) for Cargill, plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, *Mikki Graves Walser*, Commercial Litigation Branch, Civil Division, United States Department of Justice; of counsel, *Beth C. Brotman*, Office of the Assistant Chief Counsel, United States Bureau of Customs and Border Protection, for the United States, defendant.

OPINION

TSOUCALAS, Senior Judge: Plaintiff, Cargill, Incorporated ("Cargill") moves pursuant to USCIT R. 56 for summary judgment on the ground that there is no genuine issue as to any material facts. Defendant cross-moves for summary judgment seeking an order dismissing the case.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (2000).

STANDARD OF REVIEW

On a motion for summary judgment, the Court must determine whether there are any genuine issues of fact that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine if it might affect the outcome of the suit under the governing law. *See id.* Accordingly, the Court may not decide or try factual issues upon a motion for summary judgment. *See Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988). When genuine issues of material fact are not in dispute, summary judgment is appropriate if a moving party is entitled to judgment as a matter of law. *See* USCIT R. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

DISCUSSION

I. Background

The merchandise subject to this action was entered in the port of Chicago, Illinois between March 19, 1996, and April 26, 1996. *See* Summons. The subject merchandise involves thirteen consumption entries covering merchandise identified as "deodorizer distillate" on the commercial invoices. *See* Mem. Supp. Def.'s Opp.'n Pl.'s Mot. Summ. J. & Supp. Def.'s Cross-Mot. Summ. J. ("Customs' Mem.") at 2. The subject merchandise is a residual by-product attained during the deodorization process of edible vegetable oils, which removes unwanted constituents during refining. *See* Compl. ¶7. The United States Customs Service[1] ("Customs") classified the imported merchandise under heading 3824 of the United States Harmonized Tariff Schedule ("HTSUS"), subject to a duty rate of 3 cents per kilogram, plus 12.2 percent *ad valorem*. *See id.* ¶12. Plaintiff filed a timely protest and application for further review with Customs challenging the classification of the subject merchandise under HTSUS 3824.90.28. *See id.* ¶13. Cargill requested reliquidation of the entries under subheading 3823.19.40, which carries a duty rate of 4.4 percent *ad valorem*. *See id.* On July 29, 1999, Customs issued Headquarters Ruling Letter ("HRL") 960311, holding that deodorizer distillate imported with a mixture of fatty acids that contains 5 percent or more of tocopherols is classifiable under subheading 3824.90.28, while a mixture of fatty acids containing less than 5 percent by weight of tocopherols is classified under 3824.90.9050. *See* Customs' Mem. Ex. D at 3. In reaching its decision, Customs states: "We agree [with Cargill's opinion that] the deodorizer distillate is not *prima facie* classified in heading 3823, and it is not classified in heading 3823

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[1] The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. *See* H.R. Doc. No. 108–32 (2003).

by virtue of [Rule 1 of the General Rules of Interpretation, HTSUS ('GRI 1')]. However, we disagree with the protestant's opinion concerning heading 3824." *Id.* at 2. Accordingly, Customs found that since the deodorizer distillate is not classifiable under heading 3823, by virtue of GRI 1, and is not elsewhere specified or included in the tariff, then pursuant to GRI 1, the merchandise is classifiable under heading 3824. *See id.* at 2–3.

The HTSUS sections relevant to the Court's discussion are set forth below:

3823	Industrial monocarboxylic fatty acids; acid oils from refining; industrial fatty alcohols:
	Industrial monocarboxylic fatty acids; acid oils from refining:
3823.11.00	Stearic acid
3823.12.00	Oleic acid
3823.13.00	Tall oil fatty acids
3823.19	Other:
3823.19.20	Derived from coconut, palm-kernel or palm oil
3823.19.40	Other . . . 4.4%
. . . .	
3824	Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products) not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified of included:
. . . .	
3824.90	Other:
	Other:
	Mixtures containing 5 percent or more by weightof one or more aromatic or modified aromatic substances:
. . . .	
3824.90.28	Other . . . 3¢/kg + 12.2%

II. Contentions of the Parties

A. Cargill's Contentions

Cargill complains that Customs wrongly liquidated or reliquidated the subject merchandise under subheading 3824.90.28 instead of the

more specific subheading 3823.19.40. *See* Pl.'s Mem. Supp. Mot. Summ. J. ("Cargill's Mem.") at 1–32. Cargill argues that, by applying GRI 1, the imported deodorizer distillate is *prima facie* classifiable under heading 3823. *See id.* at 14–18. Cargill asserts that the classification of merchandise begins with GRI 1. *See id.* at 13 (noting that "GRI 1 provides that classification is to be determined 'according to the terms of the headings and any relative section or chapter notes' " (quoting GRI 1)). Cargill maintains that heading 3823 "describes monocarboxylic fatty acids, regardless of whether they are presented separately or together in a combination or mixture." Cargill's Mem. at 14. Relying on the explanatory notes of the HTSUS ("*Explanatory Notes*") Cargill states that merchandise described by heading 3823 may contain substances not classifiable under Section VI but excludes separate chemically defined elements or compounds. *See id.* at 14–15. Consequently, Cargill argues that "there is no reason for the Court to find a narrower meaning of the terms of Heading 3823 here." *Id.* at 16.

Cargill further argues that heading 3823 is an *eo nomine* provision because it specifically describes a class or kind of merchandise by name. *See id.* Absent contrary legislative intent, such a provision "includes all forms of the described merchandise." *Id.* Consequently, Cargill argues, heading 3823 includes all monocarboxylic fatty acids, including those "that occur as natural combinations or mixtures of more than one of such fatty acid." *Id.* Furthermore, Cargill asserts that the subject merchandise is imported in bulk tanks for industrial consumers and, therefore, falls within the definition of industrial. "The term 'industrial' in Heading 3823 refers to the condition in which the merchandise is imported, *i.e.*, in bulk, for industrial consumers." *Id.* at 17. Consequently, since heading 3823 specifically provides for the classification of the subject merchandise, Cargill argues that Customs is precluded from classifying it under 3824, the "basket" chemical provision, "which is limited to preparations of the chemical or allied industries that are not elsewhere specified or included." *Id.*

Cargill further argues that the *Explanatory Notes* to heading 3823 indicate that industrial monocarboxylic fatty acids are generally obtained by the saponification[2] or hydrolysis of natural fats or oils. *See id.* at 18–19. According to Cargill, the subject merchandise is obtained "during the deodorization stage in which the [crude] vegetable oil is subjected to steam distillation under a vacuum to remove substances that are undesirable in edible vegetable oil." *Id.*

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[2] "Saponification" is defined as "the decomposition of a fat by the addition of an alkali which combines with its fatty acids to form a soap, the remaining constituent, glycerine, being consequently liberated." *Oxford English Dictionary* 474 (2nd ed. 1989).

Cargill also asserts that the exemplars of the merchandise covered by heading 3823 include an article referred to as "fatty acid distillate," which is defined by the method of its production and physical characteristics. *See id.* at 19. Cargill maintains that the manner in which the subject merchandise is produced and its physical characteristics is the same as the "fatty acid distillate" described in the *Explanatory Notes*. *See id.* Specifically, the fatty acid distillate "is characterized by a high free fatty acid content." *Id.* (quoting *Explanatory Notes*). Cargill states that free fatty acids predominate in the subject merchandise over any other substance and, therefore, has the characteristic of a high free fatty acid content and should have been classified under heading 3823. *See id.* at 19–20. Cargill asserts that the *Explanatory Notes* merely describe high free fatty acid content as a characteristic of fatty acid distillate. *See id.* at 24. The *Explanatory Notes* do not set out "any minimum percentage of free fatty acid content for 'fatty acid distillate.' " *Id.* Since no tariff definition of "high free fatty acid" exists, Cargill maintains that "if there is no legislative intent to the contrary, the tariff terms are to be construed in accordance with their common or popular meaning." *Id.* Cargill, citing various dictionary definitions of the word "high," argues that the term means greater than others or prominent in rank or standing. *See id.* at 25. Since the free fatty acids contained in the subject merchandise are greater than any other substance, Cargill deduces that it qualifies as a "fatty acid distillate" described in the *Explanatory Notes*. *See id.* at 24. Cargill maintains that its merchandise "is correctly characterized by a 'high' free fatty acid content and thus, appropriately classified under HTSUS Heading 3823," instead of the "basket" provision, heading 3824. *Id.* at 25. Classification under heading 3824 is precluded pursuant to GRI 1 because heading 3823 is the more specific heading. *See id.* at 26–27.

Finally, Cargill contends that Customs' HRL 960311 is not entitled to *Skidmore* respect because it is based on a number of assumptions that have no analytical or factual support. *See id.* at 27–28 (referencing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Moreover, Cargill points out that "the ruling was not subject to formal notice and comment procedures, nor was it adopted as a part of a rulemaking process." *Id.* at 31. Cargill deduces that HRL 960311 lacks thoroughness, contains unsupported assertions and contains invalid reasoning. *See id.* at 28–29. While HRL 960311 is consistent with previous rulings, Cargill argues that "those rulings suffer from the same deficiencies that it does." *Id.* at 29. Furthermore, Cargill contends that HRL 960311 contravenes judicial precedent and implicitly applies the "more than" doctrine which was rejected by the United States Court of Appeals for the Federal Circuit in *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1353–54 (Fed. Cir. 2001). *See* Cargill's Mem. at 30–31.

B. Customs' Contentions

Customs replies that it properly classified the imported deodorizer distillate under subheading 3824.90.28. *See* Customs' Mem. at 6–31. Customs points out that "the first step in analyzing a classification issue is to examine the terms of the provision at issue in order to determine legislative intent." *Id.* at 9 (citation omitted). Turning to the GRI for guidance, Customs concludes that "when determining whether an imported good is classifiable within the scope of a provision encompassing a named material or substance, and the good is a mixture, the essential character of the good must be determined in order to ascertain whether or not it falls within the scope of the tariff provision." *Id.* at 10–11. Customs asserts that explanatory note VIII to GRI 3(b) elucidates the factors which determine essential character, "by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods." *Id.* at 11–12 (emphasis in original omitted). Accordingly, Customs concludes that an essential character analysis pursuant to GRI 2(b) and GRI 3(b) reveals that the deodorizer distillate's essential character is derived from its tocopherol rather than its fatty acid content. *See id.* at 27–31. The subject merchandise does not derive its value from its fatty acid content but from its non-fatty acid component. *See id.* at 30.

Customs also points out that Rule 1(a) of the Additional United States Rules of Interpretation ("ARI") sets forth specific requirements for classification under a "principal use" provision. *See id.* at 12–13. Customs maintains that "the classification of merchandise pursuant to ARI 1(a) is controlled by the use of the 'class or kind' of merchandise to which the goods belong and not the 'actual' use to which the specific imported merchandise is put." *Id.* at 12 (citing *Primal Lite, Inc. v. United States*, 182 F.3d 1362 (Fed. Cir. 1999)). Accordingly, Customs argues that in reading the GRIs and ARIs together, the imported deodorizer distillate "must be classified based upon that constituent substance from which it derives its essential character and a determination must be made as to whether or not the constituent substances from which it derives its essential character is of the same class or kind as 'industrial monocarboxylic fatty acids.' " *Id.* at 13.

Since industrial monocarboxylic fatty acids is not statutorily defined, Customs asserts that "the correct meaning of the phrase is its common meaning, in the absence of a proven commercial meaning different from the common meaning or contrary to legislative intent." *Id.* at 14. While there is no definition for industrial monocarboxylic fatty acids in any standard or technical lexicons, Customs opines that the phrase's meaning can be gleaned from the definitions of the individual terms. *See id.* at 15. Customs agrees with Cargill that "commercially, 'industrial monocarboxylic fatty acids' is a technical way of identifying a class of fatty acids which con-

sists of 'mixtures or blends of fatty acids.' " *Id.* at 16. Furthermore, Customs acknowledges that the kinds of fatty acids covered by heading 3823 are all mixtures or blends of fatty acids. *See id.* at 16–18. Customs argues, however, that such covered fatty acids are between 90 percent to 100 percent fatty acids with only *de minimus* amounts of non-fatty acid constituents. *See id.* at 17–18. A "class or kind" analysis in this case would show that the subject merchandise is not included in the class of goods commercially used as industrial monocarboxylic fatty acids. *See id.* at 18. Customs maintains that the deodorizer distillate does not have the same general characteristic as the kinds of fatty acids contemplated by the tariff term "industrial monocarboxylic fatty acids." *See id.* at 19.

Customs also asserts that the fatty acids encompassed by heading 3823 contain a higher percentage of fatty acids than the subject merchandise, 90 percent compared to less than 50 percent. *See id.* The imported deodorizer distillate is not used the same way as the fatty acids encompassed by heading 3823, which "are used as commercial fatty acids or their constituent chemical fatty acid components are isolated for specific applications." *Id.* Rather, the subject merchandise "is imported as a primary source material for tocopherols and sterols." *Id.* at 20. Commerce asserts that it would be impractical for the imported deodorizer distillate to be used for its fatty acid component. *See id.* Cargill's exhibits demonstrate that "the value of the deodorizer distillate depends upon the content of the unsaponifiables, pricing is based upon tocopherol content and stigmasterol content, or both, depending on market demand for each ingredient." Customs' Mem. at 20; *see* Cargill's Mem. at Exs. B and C.

While Customs concedes that the imported deodorizer distillate is "obtained from fats and oils which have been subjected to vacuum distillation in the presence of steam as part of a refining process," Customs argues that the deodorizer distillate is not a fatty acid distillate covered by explanatory note 5 to heading 3823. *Id.* at 23. The imported deodorizer distillate does not have a sufficiently "high" free fatty acid content to be classified as monocarboxylic fatty acids under heading 3823. The deodorizer distillate has at best a 50 percent fatty acid content whereas the fatty acid mixtures encompassed by the heading contain at least 90 percent fatty acids. *See id.* Commercially "high" free fatty acid is based on the amount of unsaponified matter contained in the deodorizer distillate and not upon the actual dry weight of the free fatty acids. *See id.* A deodorizer distillate with 10 percent or more of unsaponifiable matter is considered to be low in fatty acids whereas a deodorizer distillate with less than 5 percent unsaponifiable matter is considered "high" in acidity and, thus, characterized by a high free fatty acids content. *See id.* at 23–24. Here, the deodorizer distillate contained more than 10 percent unsaponifiable matter and was considered to be low in free fatty acids. *See id.* Accordingly, Customs contends that the deodorizer distillate was

properly classified under heading 3824 because it is a by-product of the oil refining industry as required by the terms in that heading. *See id.* at 31. "The deodorizer distillate is similar to the examples of the residual products of chemical or allied industries in the *Explanatory Notes* to Heading 3824. . . ." *Id.* In addition, the subject merchandise is a by-product used, after importation, for the extraction of various substances which are used to manufacture other products. *See id.*

Finally, Customs asserts that HRL 960311 is entitled to *Skidmore* respect because Customs has specialized experience in the classification of merchandise. Customs relied on this expertise in HRL 960311 to give "a reasoned analysis of the proper classification of the merchandise at issue here." *Id.* at 37. Customs' decision is supported "by the plain language of the competing provisions, basic tenets of classification, and the framework of the HTSUS as it applies to fatty acids, mixtures of fatty acids, and their derivatives." *Id.* at 38. Customs also maintains that HRL 960311 is consistent with prior classifications of similar merchandise. *See id.* at 39–40.

III. Analysis

A. Motion for Summary Judgment

Determining whether imported merchandise was classified under the appropriate tariff provision entails a two-step process. *See Sabritas, S.A. de C.V. v. United States*, 22 CIT 59, 61, 998 F. Supp 1123, 1126 (1998). First, the proper meaning of specific terms in the tariff provision must be ascertained. Second, whether the imported merchandise falls within the scope of such term, as properly construed, must be determined. *See Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). The first step is a question of law and the second is a question of fact. *See id.*; *see also Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997). Pursuant to 28 U.S.C. § 2639(a)(1) (1994), Customs' classification is presumed correct and the party challenging the classification bears the burden of proving otherwise. *See Universal Elecs.*, 112 F.3d at 491. This presumption, however, applies only to Customs' factual findings, such as whether the subject merchandise falls within the scope of the tariff provision, and not to questions of law, such as Customs' interpretation of a particular tariff provision. *See Sabritas*, 22 CIT at 61, 998 F. Supp. at 1126; *see also Universal Elecs.*, 112 F.3d at 491; *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). When there are no material issues of fact in dispute, as is admitted by both parties in the present case, the statutory presumption of correctness is irrelevant. *Goodman Mfg.*, 69 F.3d at 508.

The ultimate question in every tariff classification is one of law; "whether the merchandise is properly classified under one or another classification heading." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). Where, as in the instant case,

there is no disputed material issue of fact to be resolved by trial, disposition by summary judgment is appropriate. Pursuant to 28 U.S.C. § 2640(a) (1994), Customs' classification decision is subject to *de novo* review based upon the record before the Court. Accordingly, the Court must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

B. Skidmore Respect

As a preliminary matter, the Court finds that Customs is not entitled to *Skidmore* respect. In *Skidmore*, 323 U.S. at 140, the Supreme Court set forth the factors a reviewing court is to consider in determining how much weight an agency's decision is to be afforded. The amount of respect an agency's decision is afforded by a court "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." *Id.* The power to persuade of each Customs' classification ruling may vary depending on the *Skidmore* factors articulated in *United States v. Mead*, 533 U.S. 218 (2001). *See Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1370 (Fed. Cir. 2004). Applying these factors to the case at bar, the Court finds that Customs did not give thorough consideration and provide valid reasoning in HRL 960311.[3] The Court recognizes that Customs classification rulings are entitled to "a respect proportional to [their] 'power to persuade'," *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140), but the Court has an "independent responsibility to decide the legal issue regarding the proper meaning and scope of the HTSUS terms." *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed Cir. 2001)).

C. Classification Under Heading 3823

Cargill argues that the application of GRI 1 renders the imported deodorizer distillate as *prima facie* classifiable under heading 3823, HTSUS. *See* Cargill's Mem. at 14–18. Cargill contends that this heading encompasses a class or kind of merchandise, industrial monocarboxylic fatty acids, which includes the subject merchandise. *See id.* If Cargill is correct that the deodirizer distillate is classifiable under heading 3823, then Customs' classification under heading 3824, a "basket" provision, would be incorrect. The classification of imported merchandise under a "basket" provision is only appropriate

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[3] The Court notes, however, that Customs has specialized experience which can aide the Court in its review of the questions at issue in this case. *See Mead*, 533 U.S. at 234.

when there is no other tariff category that covers the merchandise more specifically. *See EM Indus., Inc. v. United States*, 22 CIT 156, 165, 999 F. Supp. 1473, 1480 (1998) (stating that " '[b]asket' or residual provisions of HTSUS Headings . . . are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading"). Consequently, the Court must first determine whether the imported deodorizer distillate is more specifically classifiable under heading 3823. *See Lynteq, Inc. v. United States*, 976 F.2d 693, 698 (Fed. Cir. 1992).

Pursuant to GRI 1, the definition and scope of terms of a particular provision is to be determined by the wording of the statute and any relevant section or chapter notes. *See Sabritas*, 22 CIT at 62, 998 F. Supp. at 1126–27. GRI 1 states that "classification shall be determined according to the terms of the headings and any relative section or chapter notes. . . ." Although Cargill asserts that heading 3823 is an *eo nomine* provision, the Court finds that, for the reasons set forth below, heading 3823 is not an *eo nomine* provision but rather a designation for goods by class.

If a tariff term is not statutorily defined in the HTSUS and its intended meaning cannot be discerned from legislative history, then the definition is determined by ascertaining its common and commercial meaning. *See Lynteq*, 976 F.2d at 697–98; *see also Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). To ascertain a tariff term's common meaning, the Court may consult dictionaries and scientific authorities, as well as its own understanding of the term. *See Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1998), *cert. denied*, 488 U.S. 943 (1988). The common and commercial meaning of a term is presumed to be the same. *See Sarne Handbags Corp. v. United States*, 24 CIT 309, 316, 100 F. Supp. 2d 1126, 1133 (2000). The Court, in determining the definition of tariff terms, may also use the *Explanatory Notes*, which provide guidance in interpreting the language of the HTSUS. *See Bausch & Lomb, Inc. v. United States*, 21 CIT 166, 174, 957 F. Supp. 281, 288 (1997), *aff'd*, 148 F.3d at 1363.[4]

While heading 3823 encompasses "industrial monocarboxylic fatty acids; acid oils from refining; industrial fatty alcohols," *see* HTSUS 3823, the definition of "*industrial* monocarboxylic fatty acids" is not specifically defined in the HTSUS or in the relevant legislative history. Consequently, the Court must determine, as a matter of law, the common and commercial meaning of the phrase. *See E.M. Chems. v. United States*, 920 F.2d 910, 912 (Fed. Cir. 1990). While the definition of the phrase is not found in any standard or technical

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[4] The *Explanatory Notes* are not legally binding on the United States, yet they "generally indicate the 'proper interpretation' of provisions within the HTSUS . . . [and] are persuasive authority for the Court when they specifically include or exclude an item from a tariff heading." *Sabritas*, 22 CIT at 62, 998 F. Supp at 1127.

dictionaries, its meaning may be constructed based upon the definition of the individual terms. A carboxylic acid "may be classified in terms of the number of carboxyl (-COOH) groups it contains. If one carboxyl group [exists], it is designated as monocarboxylic. . . ." *Van Nostrand's Scientific Encyclopedia* 508 (7th ed. 1989). Fatty acid is "an organic monobasic acid . . . derived from the saturated series of aliphatic hydrocarbons. . . ." *McGraw-Hill Dictionary of Scientific and Technical Terms* 780 (6th ed. 2003).

Cargill asserts that the *Explanatory Notes* to heading 3823 indicate that monocarboxylic fatty acids "are generally manufactured by the saponification or hydrolysis of natural fats or oils." *See* Cargill's Mem. at 18. In addition, Cargill maintains that "[t]he method of production and physical characteristics [of the exemplar labeled fatty acid distillate] match exactly the method of production and physical characteristics of the subject deodorizer distillate." *Id.* at 19. Accordingly, Cargill contends that the imported deodorizer distillate is a monocarboxylic fatty acid under the description contained in the *Explanatory Notes*, and consequently *prima facie* classifiable under heading 3823. The Court agrees with Cargill and finds that the imported deodorizer distillate constitutes "monocarboxylic fatty acids." The deodorizer distillate is a by-product of the refining of crude vegetable oils and contains free fatty acids, including oleic, linoleic, stearic, palmitic and linolenic acids, and is obtained through the process described by the *Explanatory Notes* to heading 3823.

In drafting the HTSUS, Congress thought it appropriate to add the term "industrial" before the phrase "monocarboxylic fatty acids." Consequently, the Court must determine whether the imported deodorizer distillate constitutes monocarboxylic fatty acids within the scope of the definition of industrial. Cargill argues that "industrial" refers to the condition in which merchandise is imported, *i.e.* in bulk for industrial consumers. *See* Cargill's Mem. at 17. The Court does not agree. The common definition of the term "industrial" is "of a quality suitable for industrial use." *Oxford English Dictionary* 897 (7th ed. 1989). In heading 3823, the term "industrial" is an adjective describing the manner in which monocarboxylic fatty acids are to be used. While heading 3823 provides the more specific description of deodorizer distillate by referring to its dominant component, monocarboxylic fatty acids, the Court finds that heading 3823 is a use provision, describing a class or kind of merchandise by name. The classification decision turns on whether the imported deodorizer distillate can be characterized as containing *industrial* monocarboxylic fatty acids, that is whether the monocarboxylic fatty acids are "employed, required or used in industry." *Webster's II New Riverside University Dictionary* 625 (1988). Consequently, the Court holds that the deodorizer distillate is not *prima facie* classifiable under heading 3823.

Cargill alternatively argues that if the imported deodorizer distillate is *prima facie* classifiable under two headings, either heading 3823 or 3824, then, pursuant to GRI 2(b) and GRI 3(a) the subject merchandise should be classified under heading 3823. *See* Cargill's Mem. at 17 n.4. The Court finds that an analysis under either GRI 2(b) or GRI 3(a) excludes the deodorizer distillate from classification under heading 3823. This Court has noted that GRI 2(b) instructs that "any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance." *Pillowtex Corp. v. United States*, 21 CIT 1154, 1157, 983 F. Supp. 188, 191 (1997), *aff'd*, 171 F.3d 1370 (Fed. Cir. 1999). Plaintiff, in that case, claimed that its comforters filled with down should be classified as a "comforter of cotton" because GRI 2(b) extended the terms of a heading to include merchandise only partially comprised of the named material, and GRI 3(b) required classification based upon the essential character of the merchandise. *See id.* According to the plaintiff, its merchandise's essential character was the part of the good which predominated by weight, *i.e.* the cotton outer shell of the comforter.

In the case at bar, Cargill makes the a similar unconvincing argument. Cargill argues that the imported deodorizer distillate should be classified as an "industrial monocarboxylic fatty acid" because its free fatty acid content is in greater quantity than any other component. *See* Cargill's Mem. at 23–25. Tariff terms, however, should be interpreted to avoid absurd or anomalous results. *See Pillowtex*, 21 CIT at 1157, 983 F. Supp. at 191. An essential character analysis made according to GRI 2(b) and GRI 3(b) reveals that the essential character of the imported deodorizer distillate is not derived from its fatty acid content. Moreover, ARI 1 dictates how classification should be construed when a classification decision is controlled by use. Rule 1(a) of the ARI deals with "principal use" provisions while ARI 1(b) deals with "actual use" provisions. *See Primal Lite*, 182 F.3d at 1363. The rule states:

> a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the *principal use*.

ARI 1(a) (emphasis added). "Principal use" means the use which is greater than any other single use of the good. *See Minnetonka Brands, Inc. v. United States*, 24 CIT 645, 651, 110 F. Supp. 2d 1020, 1027 (2000). The "principal use" provision is used to classify particular merchandise according to the ordinary use of such merchandise. *See Primal Lite*, 182 F.3d at 1364–65 (construing ARI 1(a) as calling for a "determination as to the group of goods that are commercially fungible with the imported goods").

The Court finds that the deodorizer distillate's essential character is not of the same class or kind as industrial monocarboxylic fatty acids encompassed by heading 3823. While the imported deodorizer distillate's predominant component is free fatty acids, it contains less than 50 percent free fatty acids. Furthermore, the subject merchandise is not imported, obtained or used for its fatty acid content. Rather, the subject merchandise is used as a source material for its other components, specifically tocopherol and sterol. Heading 3823 specifically encompasses such fatty acids as stearic acid, oleic acid, tall oil acids and fatty acids derived from coconut, palm-kernel and palm oil. The composition of these fatty acids indicates that they are comprised of multiple types of fatty acids with *de minimus* amounts of non-fatty acid constituents. The Court agrees with Customs that the deodorizer distillate is not like the other goods encompassed by heading 3823 because the fatty acid component of the merchandise is not the part of the good with any commercial significance. In addition, the deodorizer distillate is not commercially fungible with the monocarboxylic fatty acids classified under heading 3823.

D. Customs' Classification of the Imported Deodorizer Distillate Under HTSUS Subheading 3824.90.28

The Court finds that the imported deodorizer distillate was properly classified under subheading 3824.90.28. As demonstrated in the above analysis, the deodorizer distillate is not encompassed by heading 3823. Since the merchandise does not fit under a named provision, it must be classified elsewhere, under the basket provision 3824.90.28. *See EM Indus.*, 22 CIT at 165, 999 F. Supp. at 1480. Classification under this provision is proper because the deodorizer distillate is undisputedly a by-product of a chemical or allied industry. Furthermore, the deodorizer distillate is similar to the examples contained in the *Explanatory Notes* to heading 3824, of the by-products or residual products of chemical or allied industries used in the manufacture of other products. *See Explanatory Notes.* Deodorizer distillate fits into this category, as after importation, various substances are extracted from it and used in the manufacture of other products. Additionally, the subject imported deodorizer distillate contains more than 5 percent tocopherols and sterols, the components extracted and used in manufacturing. These are aromatic substances, properly classified under heading 3824: "Mixtures containing 5 percent of more by weight of one or more aromatic or modified aromatic substances: Other." Accordingly, the Court finds that Customs properly classified the imported deodorizer distillate under 3824.90.28.

CONCLUSION

The deodorizer distillate does not fall within the common meaning of the tariff terms "industrial monocarboxylic fatty acids" because,

even though they contain fatty acids, the imported goods do not have the essential character of the same class or kind of goods encompassed by heading 3823. The deodorizer distillate is imported, obtained, and used for its other components, *i.e.* tocopherols and sterols, and not its fatty acid content. The types of fatty acids covered within the class designated "industrial monocarboxylic fatty acids" are used as commercial fatty acids. The deodorizer distillate, however, is imported and valued for its tocopherols and sterols content. Furthermore, the pricing of deodorizer distillate is determined based on the content of tocopherol and stigmasterol, depending on the market demand for each ingredient. Accordingly, Customs properly classified the subject merchandise under 3824.90.28. For the foregoing reasons, Cargill's motion for summary judgment is denied and Customs' motion for summary judgment is granted. Judgment will be entered accordingly.

Slip Op. 04–26

SHINYEI CORPORATION OF AMERICA, PLAINTIFF, v. UNITED STATES, ET. AL., DEFENDANT.

Court No. 00–00130

ORDER

This matter comes before the Court pursuant to the decision of the Court of Appeals for the Federal Circuit ("CAFC") in *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297 (Fed. Cir. 2004), and the CAFC mandate of March 12, 2004, reversing and remanding the judgment of the Court in *Shinyei Corp. of Am. v. United States*, 27 CIT ___, ___, 248 F. Supp. 2d 1350.

The CAFC held that this Court erred in granting defendant's motion to dismiss the action pursuant to USCIT R. 12(b)(1). Accordingly, it is hereby

ORDERED that plaintiff proceed with the merits of the case consistent with the CAFC's opinion.

Slip Op. 04–27

BEFORE: GREGORY W. CARMAN, JUDGE

BASF CORPORATION, PLAINTIFF, v. THE UNITED STATES, DEFENDANT.

Court No. 02–00260

[Defendant's Motion for Leave to Show Confidential Documents to a Third Party [] Consultant is denied.]

Dated: March 23, 2004

Barnes, Richardson & Colburn (*James S. O'Kelly*, *Frederic D. Van Arnam, Jr.*, *Kevin J. Sullivan*), New York, NY, for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Acting Attorney in Charge, International Trade Field Office; *Harry A. Valetk*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, for Defendant.

OPINION

CARMAN, Judge: Defendant seeks leave of Court to show confidential documents to a third-party consultant in accordance with the terms of the Stipulated Protective Order granted by this Court on November 6, 2003, pursuant to Rule 26(c) of this Court. For the reasons discussed below, this Court denies Defendant's motion.

BACKGROUND

This motion involves a discovery dispute in a case challenging the United States Bureau of Customs and Border Protection's ("Customs") denial of BASF's protest of the classification of seven entries, pursuant to 19 U.S.C. § 1514(a)(2). The imported merchandise is PIBA, also known as Puradd™ FD–100, "a clear, colorless, viscous liquid mixture consisting of polyisobutylene amine and several saturated hydrocarbons." *BASF Corp. v. United States*, No. 02–00260 (Ct. Int'l Trade Aug. 7, 2002) (Compl. ¶4); (Pl.'s Opp'n to Def.'s Mot. for Leave ("Pl.'s Opp'n") at 3.) . "The starting material for the manufacture of [PIBA] is a polyisobutylene (PIB) polymer containing an average of 25 repetitive, identical units of the monomer isobutylene. The PIB is modified in its alpha position by the addition of a single monomine group (Poly Isobutylene Amine)." (Compl. ¶4) Customs classified the merchandise as "a prepared additive for mineral oils, specifically as a gasoline detergent additive." (Mem. in Supp. of Def.'s Mot. ("Def.'s Mem.") at 2.) BASF alleges that Customs erred in classifying the imported merchandise as a fuel additive because PIBA must undergo a significant amount of blending and processing with other compounds before it can be used as a fuel additive. (Compl. ¶¶9–11.) Defendant argues that Customs properly classified

the merchandise; or in the event that the merchandise is not a prepared additive as imported, it is an "unfinished prepared additive," not classifiable under Plaintiff's suggested subheading, 3902.20.50 of the Harmonized Tariff Schedule of the United States ("HTSUS"). (Def.'s Mem. at 2–3; Compl. ¶12.)

The parties stipulated to a protective order, which the Court granted pursuant to Rule 26(c)(7) of this Court on November 6, 2003. *BASF Corp. v. United States*, No. 02–00260 (Ct. Int'l Trade Nov. 6, 2003) (granting protective order) ("Stipulated Protective Order"). This protective order contained the mutually agreed upon terms that would govern the use of confidential documents and commercial information disclosed in this case. (*Id.*) The parties are now engaged in discovery. On December 9, 2003, Defendant requested that BASF consent to its showing confidential documents obtained under the protective order to Dr. John M. Larkin, a third-party consultant selected by Defendant. (Def.'s Mem. at 3.) Defendant provided BASF with Dr. Larkin's resume and the confidentiality agreement executed by Dr. Larkin, indicating that he would abide by the terms of the protective order. (*Id.* at 6; Exs. B and C.) On December 17, 2003, BASF notified Defendant that it would "exercis[e] its rights under paragraph six of the protective order" to object to Defendant's sharing confidential information with Dr. Larkin. (*Id.* Ex. D; Letter from Pl.'s Counsel to Def.'s Counsel of 12/17/03, at 2.) BASF explained that, upon review of Dr. Larkin's resume, it is of the view that Dr. Larkin is not independent from BASF's competitors. (*Id.*) Dr. Larkin's resume states, in pertinent part, that he is "retained by Huntsman [a producer of a fuel additive that involves similar manufacturing processes as the imported merchandise] as a part-time consultant in [the] area of fuel additives . . . [and has] acted as a gasoline additive consultant for one other [unidentified] client company." (Def.'s Mem. Ex. B.)

Defendant has now filed a motion for leave to show Dr. Larkin confidential documents which it received from BASF under the protective order. Defendant asserts that disclosure to Dr. Larkin is consistent with the terms of the protective order. BASF opposes disclosure of the confidential information to Dr. Larkin, challenging his independence from BASF's competitors.

PARTIES' CONTENTIONS

I. *Defendant's Contentions*

Defendant seeks leave of Court to disclose confidential information to Dr. Larkin, the third-party consultant it has selected to assist it in preparing its defense, because BASF opposes disclosure to this particular expert based on its assertions that Dr. Larkin is not independent from BASF's competitors and that BASF would be harmed by

this disclosure. (Def.'s Mem. at 6.) Defendant argues that BASF has offered only "broad allegations of harm about what could happen if its information fell into the hands of its competitors." (*Id.* (emphasis in original).) Defendant asserts that "this Court has already examined a scenario in which an importer failed to articulate specific damages or harm that will be allegedly suffered as a result of the disclosure of confidential information to third party independent experts, and held against any restriction that would unnecessarily hamper the discovery process." (*Id.* (discussing *National Hand Tool, Corp. v. United States*, 14 Ct. Int'l Trade 490 (1990)).) Defendant contends that BASF's claims that it would suffer injury by disclosure of the confidential information to Dr. Larkin are unfounded. (*Id.* at 7.) As to BASF's concern based upon the similarities in production processes used to manufacture polyether amines ("PEA"), a product manufactured by Huntsman, and PIBA, the product manufactured by BASF, Defendant states that "Dr. Larkin has explained . . . that there is no overlap between the production of PEA . . . and PIBA . . . that would allow Huntsman to improve the production of PEA, or to alter its manufacturing processes to produce a form of PIBA that would compete with BASF in the marketplace." (*Id.*)

Defendant also highlights the fact that Dr. Larkin has signed a confidentiality agreement, in which he agreed to be bound by the terms of the protective order, and that BASF has presented no reason why Dr. Larkin would violate the protective order. (*Id.* at 7–8.) Defendant concludes by stating that it would be "unduly prejudiced if it is not allowed to use Dr. Larkin's impeccable expertise in defending Customs' decision in this case [because] Dr. Larkin is a fuel additive expert with 30 years of experience in the fuel additive industry." (*Id.* at 8.) Underscoring the fact that Dr. Larkin is only a part-time consultant to Huntsman, Defendant asserts that it has spent a considerable amount of time trying to find an expert with sufficient experience in the fuel additives sub-field of the fuel industry and that it is difficult to find experts who are not employed by or affiliated with a direct competitor of BASF. (*Id.*)

II. *Plaintiff's Contentions*

BASF opposes disclosure of information obtained under protective order to Dr. Larkin because Dr. Larkin is not independent of BASF's competitors. (Pl.'s Opp'n at 1.) BASF stresses that "this is not a situation where it . . . is seeking to prevent or suppress disclosure of material documents and information to its adversary"; rather, BASF asserts that is had produced the confidential documents and information[1] requested by Defendant to be used consistent with the

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[1] BASF states that the confidential documents and information that it has provided to Defendant include:

terms of the protective order. (*Id.*) BASF adds that it does not oppose disclosure of confidential documents and commercial information to an independent third-party consultant expert or consultant. (*Id.* at 6, 12.) BASF notes that, by its terms, the protective order provides that Defendant may show the confidential documents produced to "independent, third party consultants and experts." (*Id.* at 2 & n.3 (citing Stipulated Protective Order ¶6.) BASF argues that Dr. Larkin, "by his own acknowledgment is a paid consultant to a direct competitor of BASF and . . . has been a past consultant to [at least one] other compan[y] that may have been, could be, or [is] BASF's competitor[ ]." (*Id.*) BASF asserts that it has reasonably exercised its right, as provided by the protective order, to object to Dr. Larkin's access to confidential documents and information in this case. (*Id.*) BASF submits the affidavit of Susan Gardell, BASF's Marketing Manager, Fuel Additives for NAFTA Region, to support BASF's assertion that Dr. Larkin is not independent of BASF's competitors. (*Id.* at 3–4; Ex. B, Gardell Aff.) The affidavit states that "Huntsman is a direct competitor of BASF Corp. in the gasoline additive marketplace [because] Huntsman is the main toller for [PEA,] . . . a product that BASF also produces." (Ex. B, Gardell Aff. ¶¶3, 5.) The affidavit explains that, in addition to PEA being a product produced by both Huntsman and BASF, "[t]he reduction amination process used for producing PEA is the same as that used to produce [PIBA]. If Dr. Larkin were to acquire [and share with Huntsman] the BASF proprietary method for producing PIBA, . . . [then] Huntsman could use this information to refine the methods and processes by which it manufactures PEA [or] use [the information] in the manufacture of PIBA." (*Id.* ¶6.) The affidavit adds that Huntsman is a supplier of "products to the marketers of gasoline additive packages. These [marketers] directly compete with BASF." (*Id.* ¶7.) BASF notes that it does not object to Dr. Larkin's participation in this case as an advisor to Defendant. (Pl.'s Opp'n at 11.) BASF seeks only to limit Dr. Larkin's access to specific confidential documents that BASF has identified. (*Id.*; Ex. A, "BASF Confidential Info. and Docs. Disclosed to the Gov't During Discovery in Ct. No. 02–00260.")

BASF challenges Defendant's assertion that it has to show "good cause" in objecting to Dr. Larkin's access to the confidential informa-

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(1) the process by which the imported product—[PIBA]—is manufactured and the ingredients that go into the manufacture of PIBA; (2) the product specifications for PIBA; (3) the identity of BASF AG's customers for PIBA; (4) the chemical composition and formula of PIBA; (5) BASF's U.S. production process for the manufacture of deposit control additive packages (DCAP) in the United States; (6) the DCAP product specifications required of BASF by its customers; and (7) the results of various industry-wide tests run on the imported PIBA showing the unsuitability of it for use as a gasoline additive in its imported condition.

(*Id.* at 3 (footnote omitted); Ex. A.)

tion. (Pl.'s Opp'n at 4.) BASF asserts that a Rule 26(c)(7) of this Court requires a showing of "good cause" when a party seeks a protective order. (*Id.* at 5.) In this case, however, a protective order has already been granted. (*Id.*) BASF asserts that, contrary to the issues in the cases cited by Defendant to support its argument, it is not attempting to prevent disclosure of confidential information or prevent Defendant from showing confidential information to any independent third-party expert. (*Id.* at 4–6.) BASF argues that the issue before the Court is the "express language of the stipulated protective order"; specifically, the use of confidential information to a manner consistent with the mutually-agreed upon terms of the order. (*Id.*)

BASF contends that, given the fact that a protective order is already in place, Defendant bears the burden of establishing that "its need to disclose BASF's confidential information and documents to Dr. Larkin is relevant and necessary to the prosecution of this case, and that this necessity outweighs the harm disclosure will cause BASF." (*Id.* at 6–7 (citing 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2043 (2d. Ed 1994) (additional citations omitted).) BASF asserts that Defendant has failed to meet this burden. (*Id.* at 7.)

BASF argues that, even if Defendant has made a proper showing of necessity, "courts have historically found that the irreparable harm that can be suffered by the disclosing party will outweigh the need to disclose confidential information to a competitor." (*Id.* at 7 (citations omitted).) BASF notes that courts have declined to permit disclosure of confidential information to a party's competitor and to the in-house counsel of a party's competitor based on the possibility of "[i]nadvertant or accidental disclosure [which] may or may not be predictable." (*Id.* at 7–9 (quoting *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984).) BASF asserts that Defendant's motion should be denied based upon the following: (1) Dr. Larkin's ongoing affiliation with a BASF competitor; (2) the nature of the confidential documents and information already disclosed to Defendant; (3) Defendant's failure to establish that it will be prejudiced by Dr. Larkin being denied access to the confidential information, particularly, given that Dr. Larkin has not been identified as an expert witness; and (4) Defendant's failure to identify the specific documents that Dr. Larkin would need to review. (*Id.* at 9–15.)

DISCUSSION

Rule 26(c) of this Court provides that the Court, "[u]pon motion by a party . . . from whom discovery is sought . . . and for good cause shown, the court may make any order which justice requires to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense, including . . . the following: . . . that a trade

secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." USCIT R. 26(c)(7).

Because the language of Rule 26(c)(7) of this Court and Rule 26(c)(7) of the Federal Rules of Civil Procedure is fundamentally the same, the Court may look to cases which have interpreted and applied the Federal Rules of Civil Procedure for guidance. *See Nat'l Hand Tool*, 14 Ct. Int'l Trade at 492–493 (citing *A. Hirsh, Inc. v. United States*, 657 F. Supp. 1297, 1303 n.15 (Ct. Int'l Trade 1987)); FED. R. CIV. P. 26(c)(7). It is well established that "under Rule 26(c)(7), the trial court has broad discretion to determine whether a protective order is warranted, and the specific restrictions that should be imposed." *Nat'l Hand Tool*, 14 Ct. Int'l Trade at 492 (citation omitted); *see also*, *Dove v. Atl. Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992). "In the exercise of its discretion, and in determining the scope of a protective order, the trial court 'must be guided by the liberal federal principles favoring disclosure, keeping in mind the need to safeguard confidential information transmitted within the discovery process from disclosures harmful to business interests.' " *Nat'l Hand Tool*, 14 Ct. Int'l Trade at 493 (citation omitted).

It is well established that the party seeking a protective order bears the burden of demonstrating the 'good cause' to support the issuance of such an order. *See id.* at 493 (quoting *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 202 (S.D.N.Y. 1977).). "Furthermore, when a party asserts that the discovery process will cause competitive injury because it will result in the revelation of trade secrets, the party cannot rely solely upon conclusory statements, 'but must present evidence of specific damage likely to result from disclosure.' " *Id.* (quoting *Culligan v. Yamaha Motor Corp., USA*, 110 F.R.D. 122, 125 (S.D.N.Y. 1986)).

After a protective order issues, the court will balance the interests of the parties, in the event that the party in receipt of confidential information under that order seeks to utilize the information in a manner that is opposed by the producing party. *See Telular Corp. v. VOX2, Inc.*, 2001 U.S. Dist. LEXIS 7472, at *3 (N.D. Ill. 2001); *Advanced Semiconductor Materials Am., Inc. v. Applied Materials, Inc.*, 1996 U.S. Dist. LEXIS 21459, at *8 (N.D. Cal 1996); *see also*, 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2043. When, as is the issue here, disclosure of confidential information to a third-party consultant is opposed by the disclosing party, this court will balance the movant's interest in selecting the consultant most beneficial to its case, considering the specific expertise of this consultant and whether other consultants possess similar expertise, against the dis-

closing party's interest in protecting confidential commercial information from disclosure to competitors. *See Telular*, 2001 U.S. Dist. LEXIS 7472, at *3; *Advanced Semiconductor*, 1996 U.S. Dist. LEXIS 21459, at *8.

This Court finds that Defendant has failed to establish that its need to use Dr. Larkin in preparing the defense of this case outweighs BASF's interests in keeping confidential commercial information from a competitor. This Court denies Defendant's motion for leave to show confidential documents and information to Dr. Larkin.

It is undisputed that there is a protective order in place in this case and that the language of the protective order was mutually agreed-upon by the parties. (*See* Stipulated Protective Order.) The relevant portion of the protective order states:

> Confidential Documents may be shown to third party consultants and experts, who sign a certification stating they are independent of all manufacturers or vendors of competitive merchandise, who are retained for the purpose of assisting in the preparation of this action on the condition that, before making disclosure, defendant must obtain an agreement in writing to be bound by the provisions of this Order (in the form of Exhibit A hereto) from such consultant, expert or other third party. Confidential Documents may be shown to third party consultants and experts who are affiliated with, employed by, or consultants to manufacturers or vendors of competitive merchandise, only with prior written consent of plaintiff, or upon order of the Court.

(Stipulated Protective Order ¶6 (first emphasis added).) It is also undisputed that the documents Defendant seeks to show Dr. Larkin are confidential and that Huntsman is a fuel additives manufacturer. (*See* Def.'s Mot. Exs. B and D; Pl.'s Opp'n Exs. A and B.) Additionally, there is no dispute that Dr. Larkin maintains a relationship with Huntsman as a retained, part-time consultant, acting as a liaison between Huntsman's fuel additive research team and Huntsman's fuel additive customers. (Def.'s Mot. Ex. B; Pl.'s Opp'n Ex. B.) BASF contends, and Defendant does not expressly deny, that Huntsman is a direct competitor of BASF in the fuel additive market. (*See generally*, Pl.'s Opp'n at 15, Ex. B, Gardell Aff ¶3; Def.'s Mem. at 8.) Seemingly, Dr. Larkin will remain on retainer to Huntsman during the course of this case and thereafter.

The agreed-upon language of the protective order includes precautions intended to protect BASF from possible competitive injury. (*See* Stipulated Protective Order ¶6.) BASF is seeking to exercise that precaution. Accordingly, the Court will balance Defendant's interest

in selecting the consultant it believes will be the most useful to its case, against BASF's interest in protecting its trade secrets and confidential information from disclosure to its competitors. *See Telular*, 2001 U.S. Dist. LEXIS 7472, at *3; *Advanced Semiconductor*, 1996 U.S. LEXIS 21459, at *8.

Defendant relies on Rule 26(c)(7) and cases addressing whether the issuance of a protective order is proper to assert that BASF is attempting to prevent disclosure of relevant confidential information and that BASF must show good cause as to why the confidential documents should not be provided to Dr. Larkin. (*See* Def.'s Mem. at 5–8.) The Court, however, finds that Defendant has not framed the issue accurately. The cases upon which Defendant relies, particularly, *National Hand Tool*, address issues involving broad prevention of disclosure of confidential information to any third-party consultant or expert. Specifically, the "major dispute" before the court in *National Hand Tool* "pertain[ed] to [a paragraph] of plaintiff's proposed protective order, which preclud[ed] confidential information from being shown to anyone other than counsel for the defendant, counsel's support staff, and government employees assisting counsel in the conduct of the action." *Nat'l Hand Tool*, 14 Ct. Int'l Trade at 493. In *National Hand Tool*, the defendant's proposed protective order contained essentially identical language as paragraph six of the Stipulated Protected Order in this case. *Compare id. with* Stipulated Protective Order ¶6. The court in *National Hand Tool* found that the plaintiff's attempt to prevent disclosure to any third-party consultant or expert was based upon "broad allegations of harm, rather than a particularized showing of injury." *Id.* at 494 (internal citation and quotation marks omitted). Contrary to Defendant's reading of *National Hand Tool*, the court did not "[hold] against any restriction that would unnecessarily hamper the discovery process." (Def.'s Mem. at 6.) In fact, the court noted with approval that "the defendant has taken precautions in its proposed protective order to protect plaintiff from possible competitive injury," by including language that permitted free disclosure of confidential information "only to experts who are independent of all manufacturers of competitive merchandise" and language that required the plaintiff's consent prior to disclosure of information to experts who may be affiliated with plaintiff's competitors. *Nat'l Hand Tool*, 14 Ct. Int'l Trade at 494 (emphasis added). The court adopted the defendant's proposed language for the protective order, finding that the provision "with precautions, permits the disclosure of plaintiff's confidential information to third party consultants and experts." *Id.*

As an initial matter, the Court finds that Dr. Larkin is not independent from BASF's competitors. In evaluating independence, the Court will consider "the individual's relationship to or status within the receiving party's business, the likelihood of that relationship continuing, and the feasibility of separating either the knowledge

gained or the individual from future competitive endeavors." *Digital Equip. Corp. v. Micro Tech., Inc.*, 142 F.R.D. 488, 491 (D. Colo. 1992). Here, Dr. Larkin maintains a relationship with Huntsman, a fuel additive manufacturer and "a direct competitor of BASF Corp. in the gasoline additive marketplace." (Pl.'s Opp'n, Ex. B Gardell Aff. ¶3.) Although Defendant notes in its memorandum that Dr. Larkin is of the view that there is insufficient overlap in the manufacturing processes of Huntsman's PEA product and BASF's PIBA product, and, therefore, his possible disclosure of information to Huntsman would not improve Huntsman's competitive position in the marketplace, the affidavit in support of BASF's opposition indicates otherwise. (*See* Def.'s Mem. at 7; Pl.'s Opp'n Ex. B ¶¶6–7.) Nothing in the papers submitted to the Court indicates that Dr. Larkin's relationship with Huntsman will end during this proceeding or anytime thereafter. *See Advanced Semiconductor*, 1996 U.S. Dist. LEXIS 21459, at *10–*11 (permitting disclosure to an expert who last consulted with the objecting party's competitor over four years preceding the litigation and had no existing relationship with the competitor). While in no way trying to impugn Dr. Larkin's character or his commitment to abiding by the terms of the protective order, this Court is concerned with Dr. Larkin acquiring knowledge based upon BASF's confidential information that could be used to assist a BASF competitor at BASF's expense. "It is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so." *A. Hirsh, Inc.*, 657 F. Supp. at 1302. In particular, if Dr. Larkin were granted access to BASF's confidential materials, he would most likely closely study BASF's sensitive commercial information and this information would become a part of his general knowledge. This knowledge may be inadvertently disclosed to Huntsman during the course of Dr. Larkin's on-going relationship with this BASF competitor. This Court finds that BASF could be commercially harmed by disclosure of its confidential documents and information to Dr. Larkin.

Defendant has not demonstrated that its interest in using Dr. Larkin as its third-party consultant outweighs the injury that BASF would likely suffer as a result of this disclosure. Defendant has not specified with particularity why Dr. Larkin's expertise is critical for conducting its defense. (Def.'s Mem. at 8.) Although Dr. Larkin has thirty years of extensive experience in the fuel additive industry, it is not apparent that he "possesses qualifications to be an expert witness in this case which . . . other . . . experts may not possess." *Advanced Semiconductor*, 1996 U.S. Dist. LEXIS 21459, at *8.

Given the likelihood of inadvertent disclosure of highly confidential commercial information to a direct competitor of BASF because of Dr. Larkin's on-going relationship with Huntsman and Defendant's failure to establish that its need to use Dr. Larkin outweighs BASF's interests in protecting against disclosure which will harm its

commercial interests, the Court denies Defendant's motion for leave to show BASF's confidential documents to Dr. Larkin.

CONCLUSION

Upon consideration of Defendant's Motion for Leave to Show Confidential Documents to a Third Party [ ] Consultant as Provided by the Terms of the November 6, 2003[,] Stipulated Protective Order and Plaintiff's Opposition to Defendant's Motion for Leave, Defendant's motion is denied.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. / DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C04/18 3/1/04 Aquilino, J.	McNeil Consumer Prods. Co.	02–00420	3824.90.40 Various rates	3404.90.50 Free of duty	Agreed statement of facts	Minneapolis Staest
C04/19 3/1/04 Aquilino, J.	McNeil Consumer Prods. Co.	02–00449	3824.90.40 Various rates	3404.90.50 Free of duty	Agreed statement of facts	Minneapolis Staest
C04/20 3/3/04 Musgrave, J.	Pioneer Elecs.	03–00199	8528.21.70 5%	8471.60.45 Free of duty	Agreed statement of facts	Los Angeles Pioneer brand Plasma Display Monitors, model PDP–503CMX
C04/21 3/15/04 Eaton, J.	Heraeus Tenevo, Inc.	03–00444	7020.00.60 5%	7002.31.00 0%	Agreed statement of facts	Charleston High purity fused silica glass tubes

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*U.S. G.P.O.: 2004-496-409:80042